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STATE OF CALIFORNIA

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SENATE SELECT COMMITTEE TO INVESTIGATE

5

PRICE MANIPULATION OF THE WHOLESALE ENERGY MARKET

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HEARING WITH REGARD TO

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SUBPOENA COMPLIANCE

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STATE CAPITOL

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ROOM 112

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Thursday June 28, 2001 - 11:03 a.m.

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25 Reported by: Dennis G. Peyton, C.S.R. No. 2934

1 CHAIRMAN DUNN: Seeing Senator Morrow while he
2 wanders up and settles in, Secretary, if you would
3 please call the roll to establish a quorum, please.

4 THE SECRETARY: Chairman Dunn.

5 CHAIRMAN DUNN: Here.

6 THE SECRETARY: Chairman Dunn is here.

7 Senator Bowen.

8 Senator Chesbro.

9 Senator Escutia.

10 Senator Johannessen.

11 CHAIRMAN DUNN: You are here?

12 SENATOR JOHANNESSEN: I guess.

13 CHAIRMAN DUNN: You are here.

14 THE SECRETARY: Senator Kuehl.

15 SENATOR KUEHL: Here.

16 THE SECRETARY: Senator Morrow.

17 SENATOR MORROW: Here.

18 THE SECRETARY: And Senator Sher.

19 SENATOR SHER: Here.

20 CHAIRMAN DUNN: Having a quorum established,
21 let us move forward. For those that are monitoring the
22 Committee, we will be having some members that are --
23 have a conflicting schedule with Senate Judiciary and
24 may be in and out of this Committee as they are
25 addressing issues in Judiciary, so please bear with the

1 members that have to balance the -- the two
2 responsibilities.

3 Welcome everybody this morning. I think it's
4 morning. Yeah, still morning. We're here on but one
5 issue today and that is to determine the state of
6 compliance with the subpoenas that were issued and
7 served on June 11th of this month on various of the
8 market participants, primarily the generators, as we
9 have discussed.

10 And the issue before, again, the Committee is
11 simply the state of that compliance. I laid out the
12 schedule before we actually commenced the hearing. What
13 we intend to do is to call to the table the special
14 counsel to the Committee to relay on a purely factual
15 basis what has occurred with respect to the request for
16 documents and, ultimately, the subpoenas.

17 We will then invite any of the representatives
18 from any of those who received the June 11th subpoenas
19 to come forward to make whatever commentary,
20 presentation, et cetera, that they wish to make and we
21 will take it from there.

22 So without anything further, Mr. Drivon, if you
23 will take the center seat. And, Mr. Pratt, if you would
24 do your duties.

25 [Thereupon the witness, Lawrence E. Drivon,

1 swore to tell the truth, the whole truth, and nothing
2 but the truth.]

3 MR. PRATT: Thank you.

4 CHAIRMAN DUNN: While you are settling in
5 Mr. Drivon, I want to advise everyone that, of course,
6 as usual we are doing a transcript of these proceedings.
7 For all the witnesses, the Committee members, et cetera,
8 make sure that we don't speak on top of each other so
9 that it can be accurately transcribed by our court
10 reporters.

11 Thank you, by the way, the two of you, for
12 returning and -- and serving the Committee.

13 THE REPORTER: You're welcome.

14 CHAIRMAN DUNN: I also will be making as part
15 of the record the subpoenas that were served. We should
16 have them here, the copies of them here very shortly.
17 We're just having copies being made -- be made part of
18 record as well, too, so we know exactly in the record
19 what subpoenas we're referring to.

20 Mr. Drivon, welcome to that seat as opposed to
21 up here. What I would like you to do, if you would
22 please, in some detail, from a purely factual basis --
23 no editorials, please -- walk us through the history of
24 the request for documents from this Committee to the
25 generators as well as the subpoena itself and the

1 responses, bringing us right up to date today which, for
2 most individuals, just to update you, we have received a
3 flurry of different responses this morning from various
4 of the market participants.

5 Mr. Drivon.

6 MR. DRIVON: Thank you, Senator Dunn.

7 To put the parameters on it, the first response
8 I believe from any generator was April the 6th of this
9 year and the most recent is 10:30 morning. In the
10 interim, I believe the following to have occurred.

11 CHAIRMAN DUNN: Mr. Drivon, can you move that
12 mic a little bit closer to you to make sure that
13 everybody can hear you very, very clearly.

14 MR. DRIVON: Prior to my coming on board in
15 mid-April, it's my understanding that the Committee met
16 individually with each of the generators and that at
17 that time the issue of document retention and production
18 was discussed.

19 The -- at that time, or shortly thereafter, and
20 I believe on April the 5th of 2001, this Committee
21 served requests for production of documents on the
22 individual generators. Excuse me.

23 Each of those generators has had contact with
24 the Committee in a variety of ways since then and I am
25 prepared to outline for the Committee, Senator,

1 particularly the responses from each of those generators
2 as they apply to this situation.

3 CHAIRMAN DUNN: If you would, please.

4 MR. DRIVON: Taking first Duke Energy. Thank
5 you. On April the 5th of this year, a document request
6 from this Committee was forwarded to Duke Energy.

7 On the 11th of April, Duke responded to that
8 request through Mr. Kleinman, their counsel.

9 Mr. Kleinman sent us a letter expressing concerns,
10 particularly about confidentiality.

11 On the 27th of April, we issued a subpoena to
12 the California Independent Systems Operator and
13 furnished copies of those subpoenas to all concerned.

14 Thereafter, and within a few days, pursuant to
15 the tariff, Cal-ISO notified the market participants,
16 including Duke, of the Committee's subpoena.

17 On the 30th of April, Duke sent a response to
18 the Committee expressing concerns regarding the Cal-ISO
19 subpoena and confidentiality issues. The Committee
20 agreed to extend the date and time for compliance for
21 the Cal-ISO subpoena to May 7th to allow more time for
22 the market participants to respond to the issues of
23 confidentiality about which they expressed concern.

24 On May the 1st, Mr. Kleinman sent us his bullet
25 points with respect to a proposed confidentiality order,

1 and those bullet points sent by Mr. Kleinman I have here
2 and will go through them in a moment.

3 CHAIRMAN DUNN: Yes, if I may request, let's go
4 through -- factually the response that we -- the
5 Committee has received from each of the recipients of
6 the subpoenas and then come back to the issue of
7 confidentiality.

8 MR. DRIVON: It was my understanding that
9 Mr. Kleinman, through some arrangements with the other
10 respondents, the other generator respondents, had
11 expected -- had agreed to act in some sort of liaison
12 capacity.

13 CHAIRMAN DUNN: Liaison on behalf of whom?

14 MR. DRIVON: Of the generators -- of the five
15 generators.

16 CHAIRMAN DUNN: Okay.

17 MR. DRIVON: On May 1st, we responded with a
18 letter to him confirming -- confirming receipt of his
19 correspondence and showing him the extension of
20 compliance with respect to the ISO subpoena.

21 We further invited him and the other entity's
22 counsel to meet with myself and the Committee on May the
23 3rd of this year to discuss two issues. One was a
24 point-by-point response from each of the generators as
25 to the request. The second was to discuss the issues of

1 confidentiality.

2 On May 3rd of this year, Senator Dunn, Senator
3 Morrow, myself and staff met with counsel for Duke,
4 Dynegey, Mirant, Reliant, Williams and Enron.
5 Mr. Kleinman at that time accepted responsibility for
6 attempting to draft a proposed confidentiality
7 agreement. We found no time at that meeting to enter
8 into a substantive discussion with respect to the
9 individual document request.

10 On May the 4th, the Committee sent notification
11 to ISO extending the date of compliance again to the
12 14th to allow additional time with respect to the
13 question of confidentiality.

14 On May the 10th, the Committee agreed to extend
15 compliance until the 14th, from the 14th to noon on the
16 16th.

17 During this period of time, the ISO was
18 receiving responses from the generators and we were
19 receiving responses from the generators, including Duke,
20 with respect to their concerns about the form of the
21 confidentiality agreement that we had proposed to the
22 ISO, a copy of which we have and the substance of which
23 I will be prepared to discuss at the appropriate time
24 this morning.

25 On the 10th, Mr. Kleinman provided the

1 Committee with copies of Duke's records and information
2 retention policy, which was the -- one of the subjects
3 discussed at the May 3rd meeting, together with the
4 issue of nondestruction agreement, continuing the
5 original discussions with the generators that had
6 commenced before the original requests were made during
7 the meetings that each of them had with yourself and
8 others, Senator.

9 CHAIRMAN DUNN: Just let me add one thing.
10 Well, I will -- I will ask you further questions a
11 little bit later on the issue of the nondestruction
12 order or request.

13 MR. DRIVON: Thank you. In addition, Duke
14 provided the Duke Energy and Trading Marketing document
15 retention schedule and various Duke Energy North
16 American draft document retention policies. Duke
17 provided these documents with the understanding, as
18 stated in their correspondence, that the document
19 retention policies would be treated by the Committee as
20 confidential documents.

21 The Committee did not at that time nor has the
22 Committee taken a position with respect to an agreement
23 on that point, to my knowledge.

24 On May the 10th, in addition, the Committee
25 received a proposed protective order prepared by

1 Mr. Kleinman. Further on the 10th, the Committee
2 received or served a subpoena on the California Power
3 Exchange.

4 In connection with that, within the days
5 following, pursuant to tariff, the California-PX
6 notified the market participants with respect to the
7 existence of that subpoena so that they would have an
8 opportunity to discuss amongst themselves and with
9 themselves the issue of confidentiality for those
10 documents to be produced by the PX.

11 On the 14th, we agreed to extend the ISO
12 subpoena to Friday, May 18th, again, to allow more time
13 for the discussion with respect to the confidentiality
14 order.

15 By that time, we had received information from
16 the ISO that, as far as they were concerned, the former
17 confidentiality order that we suggested was okay with
18 them. The generators continued to, including Duke,
19 continued to address that issue with us and I assume
20 with the PX.

21 On the 16th, I, as special counsel to the
22 Committee, sent a letter to Mr. Kleinman memorializing
23 the discussions regarding the issue of confidentiality.
24 We, Mr. Kleinman and myself, had had a number of
25 discussions, some of them in the late evening hours of

1 the interim days we have already discussed, some of them
2 on weekends, with respect to how the confidentiality
3 issue was going to be resolved.

4 On the 30th of May -- well, before the 30th of
5 May, on the 18th of May, the Cal-ISO accepted the
6 Committee's proposal for confidentiality and that
7 document was appropriately executed. And the ISO fully
8 complied with the subpoena of this Committee, providing
9 us with the documents that we had at that time
10 subpoenaed from them.

11 There was no formal court-based action by the
12 generators in any way attempting to get a court order
13 with respect to the proposed confidentiality order that
14 the ISO ultimately accepted.

15 On the 30th of May, after several discussions
16 with Mr. Kleinman and others to the effect that the
17 confidentiality order that they were proposing was
18 unacceptable to the Committee, on the 30th of May we
19 sent a letter to counsel for Duke, Mirant, Reliant,
20 Williams and Enron expressing concerns regarding the
21 companys' document retention policies and pointing out
22 once again, as you have done at the face-to-face meeting
23 and had, on several other occasions also done, expressed
24 concern with respect to the entering into of a
25 nondestruct order with respect to documents.

1 On 6-1 of this year, Mr. Kleinman sent us a
2 letter regarding the Committee's request to issue
3 subpoena to Duke Energy expressing concerns with respect
4 to the issuance of subpoena and -- versus informal
5 document requests and discussions, wanting to continue
6 the discussion with respect to confidentiality.

7 On 6-1, Peter Kadzik, K-a-d-z-i-k, counsel for
8 Duke with Mr. Kleinman, sent a letter to the Committee
9 concerning the document retention policies of Duke
10 setting forth that Duke did not believe that they
11 were -- or saying that Duke was not destroying any
12 documents and addressing that issue in a general way.

13 On 6-11, service was effected on the agent for
14 service of process for Duke Energy Merchants California,
15 Inc., and Duke Energy Field Services, Inc., of the
16 subpoenas previously issued a day or two before by this
17 Committee, and which had been approved by this Committee
18 and requested by this Committee, and approved previously
19 by Rules appropriately prepared and served on that date.

20 On the 14th of June, Mr. Kleinman sent a letter
21 to myself to confirm our conversation extending the date
22 for compliance with the subpoenas and arrangements for a
23 meeting on the 19th of this month to discuss a request
24 in the subpoenas, that is to say, a point-by-point
25 response and confidentiality issues.

1 The Committee agreed in writing to extend the
2 compliance date for the subpoenas to June the 28th of --
3 of this year, that is, today's date.

4 On the 18th, Mr. Kleinman sent the Committee a
5 protective order, suggested form of protective order
6 that had been entered -- excuse me.

7 On the 18th, Mr. Kleinman sent the Committee a
8 copy of a -- of a signed, filed confidentiality order
9 that had been entered into between Reliant and Mirant
10 and the Attorney General of the State of California and
11 suggested to the Committee that we enter into a similar
12 order.

13 In the meantime, the Power Exchange had gone
14 through their approval process and had ultimately, after
15 notifying market participants, agreed to enter into with
16 us essentially the same confidentiality arrangement that
17 we made with the ISO.

18 And also, prior to the 19th, a great number of
19 documents was presented to the Committee pursuant to the
20 PX subpoena. We have been informed that additional
21 documents being produced under the protective order
22 agreed to by the PX is in transit at this time.

23 We -- on the 19th of this month, myself and
24 staff, together with Senator Morrow's staff, met with
25 Duke, Dynegy, Enron, Mirant, NRG, Reliant and Williams

1 to further discuss the document subpoenas and a proposed
2 protective order. That was to be a meeting involving a
3 point-by-point discussion, response with respect to our
4 request for production and subpoenas. And the meeting
5 was occupied by an extensive discussion of the second --
6 or, excuse me, an extensive discussion of the then
7 continuing issue with respect to their need for a more
8 comprehensive protective order.

9 We had little time to discuss the
10 point-by-point that we were there to do, but at that
11 time we did present them with a short list of documents
12 which we followed up the next day with in writing and
13 prepared to discuss that later, to give them a little
14 bit more of an opportunity to respond to a shorter list
15 of documents, at least as an opening -- as an opening
16 point.

17 On the 26th -- excuse me, on the 25th, six days
18 after the meeting, the Committee sent notification to
19 Mr. Kleinman and all counsel for various companies
20 served with subpoenas that no further extension for
21 compliance with the subpoenas would be offered by the
22 Committee.

23 On the 26th, we received from Mr. Kleinman
24 another draft of a proposed protective order to the
25 Committee. I have that and am prepared to talk about

1 that.

2 On the 26th, the Committee sent to Mr. Kleinman
3 and everyone written notification that the subpoenas
4 that -- bearing a compliance date of June 28th would not
5 be extended and that the Committee would hold a hearing
6 on June 28th with respect to failure to comply with the
7 subpoena and that there would be consideration by the
8 Committee at that time as to whether the Committee would
9 report -- would find and report a contempt to the full
10 Senate.

11 On the 27th, the Committee sent a letter to
12 counsel confirming that all counsel were notified at the
13 June 19th meeting and by e-mail that same day of the
14 Committee's list of 16 priority document requests.

15 On the 27th, the Committee sent a facsimile and
16 mailed a letter to all counsel acknowledging receipt of
17 a further draft of the proposed confidentiality and
18 protective order with a detailed rundown on what our
19 concerns were with that or some of our concerns were
20 with respect to that particular draft.

21 We again referred them to the confidentiality
22 agreement that we had entered into with the PX and the
23 Cal-ISO, and by that date also with the Department of
24 Water Resources of the State of California, who had also

1 documents that they had turned over pursuant to the
2 request we made of them.

3 CHAIRMAN DUNN: Mr. Drivon, if I can, back into
4 the mic a little bit -- a little bit of distance has
5 come in. I want to make sure everybody can hear.

6 MR. DRIVON: This morning I received a phone
7 call from Mr. Kleinman requesting that we further
8 discuss this matter at an appropriate time, and we
9 expect to do that. To date, the Committee has received
10 no documents from Duke, other than their document
11 retention policy.

12 CHAIRMAN DUNN: Let me follow-up, if I can,
13 Mr. Drivon, so we get a complete picture here and then
14 open it up to the rest of the Committee members, should
15 they have any questions for you. And then as I
16 mentioned before, we invite the representatives from
17 each of the generators to comment.

18 MR. DRIVON: That, Senator, is with respect to
19 Duke.

20 CHAIRMAN DUNN: I understand that.

21 MR. DRIVON: I have several more to go.

22 CHAIRMAN DUNN: That was going to be my next
23 question is with -- and I know that Mr. Kleinman served
24 as a point person for each of the generators, so where

25 it differs substantially with respect to any responses,

16

1 et cetera, from the other generators, if you touch upon
2 those, but if it's -- where it is consistent with what
3 you have already reviewed concerning Duke, we understand
4 that Mr. Kleinman was in all those meetings and so forth
5 acting on behalf of each of the generators.

6 MR. DRIVON: Thank you, Mr. Chairman.

7 Again, beginning with the early discussions and
8 leaving out points that I think are the same as Duke. I
9 did want to point out that Dynegy responded on April
10 10th to our original request and wanted to discuss, in
11 addition to confidentiality, a feasible production
12 schedule with us.

13 On the 11th of April we received from
14 Mr. Tribble, representing Dynegy, a binder containing
15 their document management program and a cover letter
16 indicating they considered that information to be
17 proprietary and the requests -- excuse me, the response
18 should be kept confidential.

19 There were other letters from them, one on the
20 16th having to do with confidentiality and other issues
21 and some other contacts with -- with Dynegy counsel
22 similar to those that I have discussed with respect to
23 Duke. And they were, to my knowledge, copied with all
24 relevant communications from us with respect to these

25 particular matters.

17

1 They have been in attendance represented by
2 counsel at each of the meetings we have had with respect
3 to these matters. And -- and the most recent
4 correspondence that we have had yesterday -- day before
5 yesterday -- excuse me -- time is sort of running
6 together, Senator, I apologize. Yesterday there was a
7 letter from Dynegy regarding confidentiality and
8 questions concerning procedures with respect to this
9 hearing.

10 Yesterday you responded verbally to
11 Mr. Tribble's inquiry requiring (sic) questions having
12 to do with procedure for today's hearing. I was present
13 in the room when that conversation took place.

14 This morning we received a communication from
15 Mr. Tribble to the effect that some quantity of
16 documents would be delivered to the Committee by 1:00
17 o'clock today. I -- I expect that perhaps those
18 documents have arrived, perhaps they are about to. We
19 understand that it will be several boxes of documents.

20 We have not been provided with inventory or a
21 list of contents with respect to those boxes. I do not
22 know the extent to which they have responded. I
23 suspect, based on the fact that they can be carried on a
24 hand truck, it is less than all of the documents we have
25 requested, since I understand from conversations with a

1 number of the generators that the documents we requested
2 run into the thousands of pages. Other than that, we
3 have received no documents from Dynegy.

4 With respect to Enron, the story is the same.
5 With respect to Enron, except that the initial request
6 for production --

7 CHAIRMAN DUNN: Let me interrupt you. Shawn,
8 if we can make sure nobody comes in and out of that one
9 because we're hearing that drill particularly out of
10 that door. Thanks.

11 Go ahead, Mr. Drivon.

12 MR. DRIVON: The -- our initial request for
13 production of documents in request form was made to
14 Enron on April the 23rd of this year as opposed to April
15 the 5th as it was on the five generators.

16 We have -- we have had correspondence and we
17 have had conversations with counsel for Enron, Mr.
18 Fergus, and others similar in nature to the responses
19 that we have had from the generators that I have
20 otherwise discussed. They were represented at each of
21 the two meetings.

22 At the first meeting, they requested to remain
23 at the wall because of the short time frame -- time

25 request and the timing of the meeting. That -- that

19

1 capacity was recognized by the Committee on -- at the
2 last meeting and at all other times they have involved
3 themselves on the same basis as have the generators.

4 We corresponded with Mr. Mohulland or Molland,
5 M-o-l-l-a-n-d, on the 9th of May with respect to our
6 request for the document retention policy. He indicated
7 that Enron would produce the relevant document retention
8 policy subject to a confidentiality agreement. I do not
9 believe we ever received any document from Enron, even
10 that one.

11 Additionally, we have had contact with them of
12 the nature similar to that that I have already covered.
13 If I'm leaving out a pertinent point, I apologize to the
14 Committee and -- and I believe counsel -- I would expect
15 counsel or some representative to be here, although I
16 spoke with Mr. Kirby this morning from Enron and he
17 indicated that he personally would not be here.

18 The latest communication with Enron --

19 CHAIRMAN DUNN: I want to talk to about this
20 one, Mr. Drivon, yeah, and we can do it now since you
21 are on Enron.

22 MR. DRIVON: Okay.

23 CHAIRMAN DUNN: Identify what it is that you

1 facsimile, the receipt time of which was 10:30 this
2 morning, a cover letter -- cover page and four
3 additional pages, which is a letter.

4 CHAIRMAN DUNN: I'm sorry, hold on, Mr. Drivon.
5 We do not -- we are having it copied and distributed.
6 These just came in before we started the committee,
7 Senator Johannessen. Without reading the whole thing,
8 but describe for the Committee what's contained in that
9 letter.

10 MR. DRIVON: I was in meeting with members of
11 Committee when this came in and some of the members of
12 Committee. I returned back to the office about 5
13 minutes until 11:00 o'clock, received a copy of this
14 letter at that time -- and I apologize, Senator, for not
15 having a copy of it on file at this time.

16 Basically, this letter calls our attention to
17 the fact that this hearing is to take place, indicates
18 to us that they believe that the appropriate time for
19 the commencement of this hearing pursuant to the
20 subpoenas is 1:00 o'clock p.m. today, not 11:00 o'clock
21 p.m. (sic) today.

22 Although the -- the fact that this Committee
23 was to convene upon the finishing of the floor session

24 this morning was conveyed to them yesterday by e-mail as
25 it was to all other participants.

21

1 And some accommodation was made with respect to
2 different participants who indicated that flights would
3 not allow them to get here as early as 9:00, as there
4 was originally some question as to whether there would
5 be a floor session this morning.

6 In addition, Enron says that their primary
7 objection to the subpoena is that it is a part of the
8 investigation of this Committee and urging to us that
9 this subpoena and this investigation violate the
10 exclusive jurisdiction of the Federal Energy Regulatory
11 Commission to investigate and regulate and administer
12 the wholesale electricity market in California and
13 elsewhere.

14 They go on to say that there are settlement
15 discussions currently under way in Washington D.C. on
16 these very issues and urge that that should have some
17 impact on this Committee's action.

18 They further object to the subpoena for
19 documents in that they say it is voluminous and,
20 further, that documents called for in the subpoena are
21 located, at least in part, outside of the State of
22 California and would urge that that puts them outside

23 the reach of this Committee, that is to say, the fact
24 that the documents are outside of the State of
25 California.

22

1 They say that -- at the meeting on June 18th,
2 that they say at which I made a -- oh, I guess they are
3 talking about you, Senator, in which you made a brief
4 appearance, that we conceded there were -- that the
5 Committee and its consultants have not yet even reviewed
6 the extensive documents and the data obtained from the
7 ISO, PX and PUC.

8 Having been at the entirety of that meeting, I
9 can assure you, Senator, I made no such concession.

10 CHAIRMAN DUNN: Senator Bowen.

11 SENATOR BOWEN: What difference does it make?
12 Are we required to evaluate documents that we already
13 have before we pursue other documents that may aid us in
14 our investigation somewhere in the law that I'm not
15 aware of?

16 MR. DRIVON: If -- if your question of me,
17 Senator, is in my capacity as special counsel to the
18 Committee?

19 SENATOR BOWEN: Yes.

20 MR. Drivon: It is my legal opinion that their
21 response is absolutely irrelevant to the process.

22 CHAIRMAN DUNN: Anything further in the letter

23 from counsel for Enron?

24 MR. DRIVON: It goes on for a couple of more
25 pages, Senator. At no place do I see that they agree to

23

1 produce the documents.

2 CHAIRMAN DUNN: Okay. The one thing I think
3 that you don't have for completeness of the record here
4 is, shortly after this letter arrived, we -- the
5 Committee did receive a document request, by document
6 request, written response which we are reviewing
7 basically as we speak, most of which includes objections
8 to all of the requests. But Mr. Drivon, you have not
9 seen that as of yet.

10 MR. DRIVON: Thank you, Senator. And I would
11 assume that that would be essentially in the form -- in
12 a form similar to responses of that general type from
13 some of the other generators in the interim time between
14 April 5th and now. And if you would like, I can explain
15 what I believe that means.

16 CHAIRMAN DUNN: Let me distinguish it, just for
17 brevity sake, and if I miss anything, correct me. What
18 you are referring to is when the document request, as
19 opposed to the subpoenas, when the document requests and
20 the 80-somewhat categories were served upon them on
21 April 5th, that some of the generators have responded
22 between then and now with a written response to the

23 various document requests, meaning either we will
24 produce or we object, whatever the case may be. But
25 those -- in your opinion as -- is -- have we received

24

1 any such correspondence concerning the subpoenas?

2 MR. DRIVON: In my -- in my opinion, in putting
3 on my special counsel hat, taking off my witness hat for
4 a moment, as you have asked for an opinion, the only
5 response that we have had of a like kind to date with
6 respect to the subpoenas themselves is the attempt by
7 Enron that I haven't seen.

8 CHAIRMAN DUNN: Okay.

9 MR. DRIVON: I also understand in my discussion
10 with Mr. Kleinman that perhaps his client, Duke, is
11 prepared to respond in a similar way today.

12 CHAIRMAN DUNN: Okay. All right.

13 SENATOR MORROW: Mr. Chair.

14 CHAIRMAN DUNN: Senator.

15 SENATOR MORROW: If I can just interject here a
16 couple questions.

17 With respect to the information that was
18 requested in April, April 5th and April 23rd, the
19 request for the documents which were followed, of
20 course, by the subpoenaed requests. I think I know the
21 answer, but I just want to verify for the record, how,

22 if any, did those requests and the subpoenas vary from
23 each other?

24 MR. DRIVON: There were certain variances, but
25 the -- the -- I would say, to give it a percentage,

25

1 Senator Morrow, I'd say they track 95 percent, that is
2 to say, the subpoena tracked 95 percent of the original
3 document requests.

4 SENATOR MORROW: In other words, notice really
5 goes back to April in terms of the documents that this
6 Committee was going to request officially?

7 MR. DRIVON: That's correct.

8 SENATOR MORROW: We followed that up. Next
9 question with regard to Enron, I just want to clarify
10 that we at least thus far received zero or no documents
11 that have been requested, including information
12 concerning their retention policy and destruction
13 policy?

14 MR. DRIVON: That's correct.

15 SENATOR MORROW: Okay. Thank you.

16 CHAIRMAN DUNN: Yes. Senator Peace.

17 SENATOR PEACE: First, as a matter of legal
18 advice with respect to Enron and others' assertion of
19 lack of jurisdiction.

20 What is our remedy to clarify jurisdiction?

22 it is not our place to assume that they may have some
23 valid position there. It is for them to make the
24 appropriate challenge, if they feel it appropriate.

25 SENATOR PEACE: Okay.

26

1 MR. DRIVON: And our place to respond.

2 SENATOR PEACE: Okay.

3 MR. DRIVON: I believe, at least in -- in
4 first -- at first blush, and this is not the first time
5 I have considered the issue of FERC's jurisdiction, I do
6 not believe that --

7 SENATOR PEACE: I'm not -- I'm going to go
8 there, but my first question is the jurisdiction of this
9 Committee and this legislature to subpoena documents
10 from companies doing business in California, who may
11 deposit their documents in states other than California.
12 I think that's a pretty well-litigated right and, in
13 fact, one that we pursued successfully in the -- even to
14 getting documents from out of the country in the Life
15 Underwriter -- I can't remember the name of the case,
16 but it was the -- yeah, the Executive Life case, so we
17 might want to communicate that.

18 CHAIRMAN DUNN: If I may add to that, Senator
19 Peace, which -- and correct me if I'm wrong, Mr. Drivon,
20 our position on that has been relayed quite regularly to

22 sense that since there is jurisdiction within the
23 legislative subpoena power over each of these entities,
24 that the physical location of those documents does not
25 defeat the subpoena.

27

1 SENATOR PEACE: Okay. On the question of
2 Enron's assertion.

3 MR. DRIVON: Excuse me, Senator, one second.
4 To bring that full circle, that question was anticipated
5 by the Committee, a request was made and there has been
6 an opinion issued with respect to that by leg counsel.

7 SENATOR PEACE: With respect to Enron's
8 interesting publication of its assertion of exclusivity
9 with respect to FERC jurisdiction, it would have been
10 helpful for them to argue that earlier in the year, just
11 an editorial comment. But have we in our requests
12 included all documents, internal documents, memos, notes
13 that may be associated with any contact between Enron
14 executives or officials and the Federal Energy
15 Regulatory Commission, its staff, and its members and,
16 in particular, have we also asked for a full accounting
17 of all of the formal -- former Federal Energy Regulatory
18 Commission staff members and commissioners who are now
19 in the employ of Enron, and have we specifically asked
20 to get a full accounting and their calendars with
21 respect to contacts that they may have had throughout

22 this period and leading into this period, both formally
23 and informally at FERC? Is that -- are those kinds of
24 requests included in your current request for documents?

25 MR. DRIVON: I believe that -- that those

28

1 documents would be covered in a general way, but not a
2 specific way.

3 SENATOR PEACE: May I recommend, Mr. Chairman,
4 that now that Enron has decided to assert the
5 exclusivity of FERC jurisdiction, that in a very direct
6 and delineated way we -- we amend our request for
7 documents to specify the request for all documents,
8 formal and informal, that deal with any kind of
9 calendars or notes that may corroborate communications
10 that occurred between Enron's officials and -- and
11 Federal Energy Regulatory Commission.

12 CHAIRMAN DUNN: And for clarification, and
13 correct me, Mr. Drivon, if your recollection is
14 different, that each of the calendars of the executives
15 of the various companies, including Enron, their
16 personal calendars were specifically requested actually
17 in the -- in the document requests.

18 MR. DRIVON: Correct.

19 CHAIRMAN DUNN: Also, we do have a binder of
20 all of these requests and the various correspondence

22 matter of the record here today as well.

23 Okay. Mr. Drivon, move on. Are you completed
24 with Enron?

25 SENATOR BOWEN: I have a question.

29

1 CHAIRMAN DUNN: Senator Bowen.

2 SENATOR BOWEN: I'd just like to make certain I
3 understand the history of this and, in particular,
4 because this letter from Enron says that no Enron entity
5 was involved in the Committee's first series of requests
6 for documents in early April.

7 Is that accurate?

8 MR. DRIVON: As I indicated to Senator Bowen a
9 few moments ago, the first formal request by way of
10 letter to Enron specifically was April 23rd, which was
11 18 days after the same request was made on the
12 generators. So they have --

13 SENATOR BOWEN: Requests were made first to the
14 generators and then to marketing and trading?

15 MR. DRIVON: Then to Enron.

16 SENATOR BOWEN: Then to Enron.

17 MR. DRIVON: We still have a few others.

18 SENATOR BOWEN: And when was the first response
19 to the April 23rd request for documents?

20 MR. DRIVON: I believe the first response from

21 Enron was on May the 2nd when Mr. Fergus, counsel for
22 Enron, forwarded a response to us indicating that Enron
23 cannot estimate how long it would take to ascertain how
24 much material was called for in the requests and,
25 additionally, expressing concerns about confidentiality,

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1 that was May the 2nd of this year.

2 SENATOR BOWEN: And what happened between May
3 the 2nd and June 18th on which you had a meeting
4 extending the time -- response time to today?

5 MR. DRIVON: On May the 9th, Mr. Molland,
6 M-o-l-l-a-n-d, counsel for Enron, sent us a response
7 with respect to our request for the document retention
8 policy. That response indicated that they would produce
9 it after we signed a confidentiality agreement. It was
10 their contention that their document retention policy
11 was confidential.

12 Thereafter, Enron -- the next that I have,
13 other than the meetings we've talked about, is on June
14 the 11th. Service was effected on National Registered
15 Agents, Inc., the appropriate agent for the service of
16 process for Enron Corporation, copies of the subpoena.
17 That's what I think has happened.

18 SENATOR BOWEN: One further question. Are
19 there independent statutory grounds under which
20 California might have a cause of action against an

21 entity that engages in collusive behavior or manipulates
22 the market? In other words, do we have any remedy other
23 than petitioning FERC for redress under California
24 statutory law?

25 MR. DRIVON: I am unwilling to express an

31

1 opinion as to whether or not -- you say "we," whether or
2 not this Committee --

3 SENATOR BOWEN: The People of State of
4 California.

5 MR. DRIVON: All right. Let me answer the
6 question in this fashion. I believe that there are
7 statutory as well as perhaps common law remedies that
8 would be available to the people of the State of
9 California in -- in various ways, that is to say, I
10 believe that the People of the State of California,
11 through the attorney general, for instance, would have
12 some statutory standing.

13 In addition to that, I believe that there are
14 potential actions qui tam that could be brought by
15 individual citizens of the State of California. And, in
16 addition, I believe that there are statutory and perhaps
17 common law grounds under which individuals and
18 businesses in the State of California could bring
19 actions against various entities on their own behalf

20 individually.

21 SENATOR PEACE: Mr. Chairman.

22 CHAIRMAN DUNN: Yes, Senator Peace.

23 SENATOR PEACE: In looking at this letter, I
24 think there's one other important reference that -- in
25 fact, it may be more important than anything that was

32

1 currently outlined in the --

2 CHAIRMAN DUNN: Which page are you on, Senator
3 Peace?

4 SENATOR PEACE: Go to page 3 near the bottom of
5 the page, and this is fascinating considering the
6 history and the players, in particular, who have -- who
7 were behind the lawsuit in San Diego forcing the release
8 of the DWR contracts. We now have Enron arguing in this
9 letter that because the judge in San Diego forced the
10 DWR contracts to be made public, that that is a reason
11 for Enron not to give this Committee the documents
12 because we can't guarantee the confidentiality.

13 Now, I find that fascinating, given the very
14 close relationships that the litigant in that lawsuit
15 has to Enron and to the generators in general where you
16 have the specter of a representative of -- allegedly of
17 the people of this state who goes into a lawsuit,
18 admittedly joined by a number of press organizations,
19 that now gets turned around and used by Enron as part of

20 their strategy to deny the information to this
21 Committee, which would reveal what kind of activities
22 were going on behind the scenes that may go well beyond
23 the questions associated with whether or not FERC
24 tariffs were followed.

25 And I don't -- I do not contest the exclusive

33

1 jurisdiction of the enforcement of FERC tariffs, but --
2 but depending upon what kind of activities were going on
3 in that time, you -- you could very well -- we may
4 ultimately find, if we can ever get to these documents,
5 activity that violated both state and federal laws,
6 including racketeering laws.

7 SENATOR BOWEN: That was my question, that was
8 the nut of my question is, is our only remedy here to
9 look at FERC tariffs? And I think it's fairly clear
10 that there are other laws and California laws that we
11 are entitled to enforce.

12 SENATOR PEACE: I would admonish the elected
13 representatives in California to be careful about
14 unwittingly becoming the pawns of very sophisticated --
15 including, frankly, the press being the pawns of -- of
16 what was -- we all know now was a market manipulation,
17 but continues to be the most sophisticated media
18 manipulation and politician manipulation exercise ever

20 this country, including the tobacco industry. These
21 guys make the tobacco guys look like paupers, and the
22 reason is the tobacco guys were nowhere near as slick as
23 these guys are.

24 And -- and this -- this paragraph in this
25 letter, I think, speaks volumes about how well

34

1 orchestrated and well thought out and the degree to
2 which these guys are three and four steps ahead of us.

3 MR. DRIVON: I apologize for failing to point
4 out that Enron suggests in this letter that the judicial
5 process of the State of California in doing its job
6 somehow excuses them from compliance with the
7 legislative subpoena on the grounds that some judge, by
8 doing his or her job, find that their documents don't
9 deserve confidential treatment.

10 CHAIRMAN DUNN: Okay. Mr. Drivon, I think we
11 have covered Duke, Dynegy and Enron. Touch upon where
12 there are differences, again, touch upon the remaining
13 recipients of June 11th subpoenas.

14 MR. DRIVON: Thank you, Senator. Turning to
15 Mirant. The first response from Mirant was April the
16 10th of this year. Mr. -- the name is Sonnet,
17 S-o-n-n-e-t, Edwards responding on Mirant's behalf to
18 the Committee's document request. Ms. Edmonds, I'm

19 sorry, indicates that Mirant is in the possession of --
20 excuse me, in the process of reviewing the request and
21 evaluating the extent to which Mirant possesses
22 responsive documents and how quickly they can be
23 delivered to the Committee, also expressed her concerns
24 concerning confidentiality.

25 Three days later we received a letter from

35

1 Zackary Starbird, who has continued to correspond in
2 various ways with the Committee concerning Mirant, and I
3 understand to be their lead counsel, saying they
4 appreciate the urgency of the Committee's requests and
5 that they were working diligently to submit a detailed
6 responsive letter as early as possible.

7 Going forward here on May the 2nd.

8 Mr. Starbird forwarded his detailed response to the
9 Committee's document request. Indicated that once
10 confidentiality concerns were addressed, Mirant would be
11 able to provide a large number of helpful documents to
12 the Committee and that was the sort of point-by-point
13 response that we were talking about before, Senator.

14 On the -- May the 2nd, Lisa Cottle,
15 C-o-t-t-l-e, another attorney from Mirant, sent a letter
16 to the ISO asserting confidentiality with respect to any
17 data produced by the ISO pursuant to our subpoena.

18 As I understand, no court action was taken, no
19 attempt on the part of Mirant or any other of the
20 potential respondents to interdict this Committee's
21 attempts to receive these documents was made.

22 We go forward with essentially the same
23 activity that we have previously discussed. They
24 attended the meetings. On the 29th of May, Mr. Starbird
25 sent us a letter expressing concerns regarding

36

1 confidentiality and suggesting that an order to
2 facilitate, that the parties agree to jointly seek
3 judicial resolution of that question.

4 On the 30th of May, the Committee sent to
5 Mirant, as well as to the others, our expressed concern
6 regarding the company's document retention policies and
7 that the companies had not agreed to enter into what
8 is -- what I refer to as a standard nondestruct
9 agreement, and still have not. They were appropriately
10 served with the subpoenas, attended the meetings.

11 I believe that covers the effective different
12 points with respect to Mirant. To date, the Committee
13 has received no documents from Mirant.

14 CHAIRMAN DUNN: Okay. Moving on to the next
15 one.

16 SENATOR JOHANNESSEN: Mr. Chairman, if I may.

17 CHAIRMAN DUNN: Yes, Senator Johannessen.

18 SENATOR JOHANNESSEN: Am I to understand there

19 has been no agreement made as -- under the heading of
20 nondestruction of property?

21 CHAIRMAN DUNN: That is correct, and I'm going
22 to ask some questions about that as we just finish up on
23 the individual responses.

24 SENATOR JOHANNESSEN: That concerns me because
25 that is a vital question.

37

1 CHAIRMAN DUNN: If I can ask you to hold that
2 for just a minute or two and we'll be right back to
3 that.

4 MR. DRIVON: The next generator is Reliant.

5 CHAIRMAN DUNN: Again, zeroing in only on where
6 there are differences.

7 MR. DRIVON: I'm not trying to stretch it out,
8 Senator.

9 CHAIRMAN DUNN: I understand, Mr. Drivon.

10 MR. DRIVON: Again, April 5th was the date of
11 the initial response, as it was with respect to all of
12 them. On the very next day, Reliant responded through
13 Charles Stevens, its counsel, expressing a desire to
14 work cooperatively with the Committee expressing
15 concerns requiring the breadth of the requests and
16 confidentiality.

17 On the 17th, Mr. Stevens sent a more detailed
18 written response to the Committee's request of the type

19 similar to what we have previously discussed.

20 On the 30th, Randolph -- excuse me, Randolph
21 McManus, counsel for Reliant, sent us a written response
22 to the ISO subpoena and confidentiality suggestions
23 objecting to the production of confidential information
24 to the Committee, except as to materials previously
25 released to the Los Angeles Times and that was not, of

38

1 course, a release by this Committee, but refers rather
2 to what has been called "the decoder document" that was
3 published in the Los Angeles Times on May the 11th of
4 this year. To that, they had no objection.

5 They were present -- I'll try.

6 They had no object -- excuse me, they attended
7 all of the meetings and responded in a way that was
8 similar to the others, differing in some respects, but
9 essentially, to date, no documents.

10 CHAIRMAN DUNN: Okay. I believe we have one
11 more to go.

12 MR. DRIVON: I want to be no more lengthy nor
13 no more brief than is appropriate.

14 CHAIRMAN DUNN: Understood, Mr. Drivon.

15 MR. DRIVON: With respect to Williams.

16 CHAIRMAN DUNN: Which I believe -- is this
17 our -- our last one? Oh, and AES as well. And before

19 something has occurred with respect to Reliant that I
20 want to make sure everyone knows occurred since we began
21 this hearing this morning.

22 I did receive on behalf of the Committee a
23 letter from Mr. Stevens that you -- the individual you
24 have referred to, in which he advises us that -- it
25 says, "Enclosed please find document Bates stamped"-- he

1 gives the numbers. "It appears to be approximately
2 1,800 documents, which Reliant is producing voluntarily
3 in response to the Committee's subpoena, also are
4 Reliant's written responses and objections to the
5 subpoenas."

6 Mr. Stevens goes to claim, and I will read this
7 because I would like to know whether this occurred, to
8 your recollection. "Moreover, you and your staff
9 appeared to agree in principal to the broad outlines of
10 the confidentiality order, only to reverse course on
11 that agreement as soon as Reliant and the other
12 generators actually proposed such an order."

13 Did anything of that sort occur, to your
14 recollection, Mr. Drivon?

15 MR. DRIVON: It's interesting that one
16 generator would characterize our response as apparent
17 agreement while other generators have characterized our

18 response as rejecting it out of hand.

19 CHAIRMAN DUNN: All at the same meeting, I
20 presume?

21 MR. DRIVON: At the same meeting and otherwise.

22 CHAIRMAN DUNN: Okay.

23 MR. DRIVON: The answer -- the direct answer to
24 your question, Senator, is no.

25 SENATOR PEACE: Can I ask a procedural

40

1 question?

2 CHAIRMAN DUNN: Yes.

3 SENATOR PEACE: Just as a matter of
4 clarification, listening to this, it's sounding as
5 though the generators are trying to arrive at a single
6 confidentiality agreement.

7 CHAIRMAN DUNN: All of the discussions that,
8 Mr. Drivon, correct me if I'm wrong, were spear-headed
9 primarily by Mr. Kleinman, who is here today, I presume
10 will be testifying here as well, representing -- well,
11 he represents Duke specifically. He was also acting in
12 a lead position in the various meetings to attempt to
13 resolve the concerns over confidentiality. And I
14 believe all the proposed confidentiality agreements,
15 Mr. Drivon, from the generators came from Mr. Kleinman.

16 MR. DRIVON: Other than -- than the various

17 references that we have made by way of letter, all of
18 the proposals, specific proposals came through
19 Mr. Kleinman.

20 SENATOR PEACE: And those were consolidated
21 proposals, so to speak, that allegedly all the
22 generators would agree to?

23 MR. DRIVON: My understanding is that there --
24 the -- the last proposed form of confidentiality may
25 have not been agreed to by a couple of people who

41

1 Mr. Kleinman had not heard back from at the time he
2 forwarded it to us.

3 SENATOR PEACE: I don't want to complicate your
4 work.

5 MR. DRIVON: Yes.

6 SENATOR PEACE: But I do want to put on the
7 record that the fact that the generators would even
8 think to apparently meet together with their lawyers,
9 meet together in order to have a consolidated, single
10 position on their confidentiality, whether it be willing
11 to agree to confidentiality, to me, suggests collusion
12 and -- and would also suggest to me that they are very
13 accustomed to operating in -- in this fashion.

14 I find it very objectionable that they would
15 even attempt to arrive at some sort of a consolidated
16 agreement. I would think that we would want to have

17 each of those negotiations separately and distinctly
18 with each company.

19 MR. DRIVON: Well, Senator, let me respond to
20 that, because the difficulty of approaching these issues
21 made it, in -- in our opinion, advisable to work with
22 them through a single contact. And we did assure them
23 with respect to work on a confidentiality agreement that
24 we would not imply from that that they were improperly
25 colluding with respect to the substance that we're

42

1 talking about on the -- on the manipulation issue.

2 SENATOR PEACE: I assume that's the case, and
3 as I'm saying, I don't want to make your -- that's why I
4 say, I don't want to make your job more difficult, but I
5 have got to tell you, I'm discomforted by that choice.

6 CHAIRMAN DUNN: Okay. Mr. Drivon, continue.

7 MR. DRIVON: With respect to Williams, April
8 5th again was the first request date. April 10th,
9 Williams sent a response through Alex Goldberg, their
10 counsel, indicating that Williams' review of our
11 document request is not complete. They were unable to
12 provide a comprehensive response, indicating a desire to
13 discuss the request and -- as well as confidentiality
14 issues. Then looking through this, on May 1st we
15 invited Mr. Goldberg and others to the May 3rd meeting,
16 which they attended.

17 On May 11th, Mr. Goldberg forwarded a copy of
18 Williams' corporate records retention policy. Actually,
19 the Williams Companies, or the ultimate corporate parent
20 of Williams, Energy Marketing & Trading, indicating that
21 to the best of his knowledge, the policy is applicable,
22 indicating the policy is not a public document. They
23 may ultimately agree to make the document public, but it
24 was stamped confidential on each page.

25 On June the 1st, Mr. Goldberg responded to our

1 May 30th letter indicating that Williams had not engaged
2 in the quote, "active destruction of any documents that
3 could reasonably be responsive to the Committee's
4 investigation;" however, they did not agree to any
5 specific document request -- document retention policy,
6 nor agree to a specific document no destruct issue. I
7 said that poorly, but you got the point.

8 They were served with a subpoena, attended the
9 meetings and to date we have received no documents from
10 them, unless you have a more updated...

11 CHAIRMAN DUNN: Not that I'm aware of.

12 MR. DRIVON: AES is in a little bit different
13 position. AES and NRG, while I'm certain that they were
14 aware of what we were doing, were not served or provided
15 with the original document requests either on the 5th or
16 the 23rd of April and were only later served. And they

17 were served with a subpoena on April the -- excuse me,
18 on June the 11th.

19 On the 21st, we got a letter from Dane
20 Butswinkas, B-u-t-s-w-i-n-k-a-s, their counsel,
21 regarding production of documents and our, quote,
22 ongoing negotiations regarding confidentiality.

23 They, quite frankly, have not had the same
24 amount of time as -- as the five generators and Enron
25 have had. We received from NRG a request that they be

44

1 considered separately with respect to these document
2 compliance issues on the subpoena. And because of their
3 position, which is similar to AES, we granted them
4 special dispensation and are not including NRG. We did
5 include AES because they have not requested special
6 dispensation, as did NRG.

7 CHAIRMAN DUNN: Senator Johannessen.

8 SENATOR JOHANNESSEN: Thank you, Mr. Chairman.

9 Indication here is that the -- AES Corporation, the
10 first contact was made on 6-11?

11 CHAIRMAN DUNN: No, the -- AES, of course, in
12 partnership with Williams.

13 SENATOR JOHANNESSEN: Right.

14 MR. DRIVON: And the first -- let me say that
15 the first official contact with respect to documents of

17 comments that I did concerning they -- their position
18 and the position of NRG, which is identical. That
19 doesn't -- that doesn't mean that that's the first they
20 heard of it.

21 SENATOR JOHANNESSEN: No, I understand that.

22 MR. DRIVON: That's their first official
23 contact.

24 SENATOR JOHANNESSEN: Okay. But assumption had
25 been, therefore, that they have been aware of it and

45

1 have been in contact with the other people involved in
2 this from a lot longer than the 6-11.

3 MR. DRIVON: I -- I, of course, was not privy
4 to any contact they may have had amongst themselves. I
5 would assume that AES and NRG and many that we have yet
6 to address are aware of this Committee's activities with
7 respect to documents well before June 11th.

8 SENATOR JOHANNESSEN: Thank you.

9 CHAIRMAN DUNN: Anything further?

10 MR. DRIVON: Not on that point.

11 CHAIRMAN DUNN: Okay. I have been advised with
12 respect to Williams, I believe it was -- I'm sorry, AES,
13 that just as the Committee began their -- we did receive
14 some response, I don't have it here. I don't know what
15 that response is. I don't think you have it,
16 Mr. Drivon.

17 Okay. Let me ask you a couple of follow-up
18 questions for clarification and just for fill-in for the
19 Committee's purposes. You have mentioned several times
20 in your discussion this morning about the Committee's
21 request for what we refer to in shorthand as a
22 nondestruct order.

23 Can you generally give us a description of what
24 we -- what we are referring to with respect to a
25 nondestruct order and what the request by the committees

46

1 have been in that regard and the response from the
2 companies you have referenced this morning.

3 MR. DRIVON: Yes, Senator. In litigation
4 involving situations in which documents are a primary
5 issue, including multi-district litigation and other
6 litigation having that as a focal point, it is very
7 common, and I would essentially say standard procedure,
8 that an agreement not to destroy documents that might be
9 relevant is entered into on a typical basis between the
10 litigants, and frequently courts are involved.

11 And when they are, it -- it is extremely common
12 for courts, including federal courts in MDL situations,
13 to issue an order that no defendant destroy documents
14 and that every reasonable attempt be made to locate,
15 produce and secure documents by the defendants, or words

17 sentence in terms of its length.

18 CHAIRMAN DUNN: Okay. And brief the Committee
19 on the requests for such a nondestruction agreement and
20 where we sit today.

21 MR. DRIVON: I -- I must confess, Senator,
22 that -- that you have been the primary carrier of the
23 water on that point. They have been reminded on a
24 number of occasions, in a very pointed way by yourself
25 on behalf of this Committee as well as by myself as

47

1 special counsel, that we desired such a nondestruct
2 agreement from them and we have not received one.

3 CHAIRMAN DUNN: To your knowledge, what has
4 been the response from any of the representatives of the
5 generators or Enron regarding the Committee's request?

6 MR. DRIVON: Without going specifically into
7 each one, the response has basically been we won't
8 destroy any documents, we are not destroying any
9 documents. There are too many investigations going on
10 for us to think about destroying documents. Some of
11 them urged that the law already required them to
12 preserve documents under these circumstances and
13 responses of that type all by letter or other informal
14 way.

15 CHAIRMAN DUNN: But as of this date, no

17 a -- an agreement regarding nondestruction of documents?

18 MR. DRIVON: No one has agreed to execute such
19 a document by their signature, that's correct.

20 CHAIRMAN DUNN: Okay, okay. Senator
21 Johannessen.

22 SENATOR JOHANNESSEN: Thank you, Mr. Chairman.

23 One has to assume that the parties and
24 attorneys all are aware of the fact when we deal with
25 nondestruction of documents, we know what -- you know,

48

1 everyone understands what that means.

2 Are there any indications that such an activity
3 may have taken place, and do you have any feeling for
4 perhaps why the reluctance to -- to sign such an
5 agreements, why would someone not sign such an
6 agreement? Is it a -- is it a legal question here that
7 needs to be addressed separately?

8 MR. DRIVON: Let me see if I can take those
9 questions one at a time. With respect to the first
10 question, which I believe was, do we have any direct
11 indication that there may have been any destruction of
12 documents involving this case?

13 Let me answer that in this fashion. We have no
14 direct knowledge --

15 SENATOR JOHANNESSEN: Underline "direct," I

16 gather.

17 MR. DRIVON: Let me finish this answer --

18 SENATOR JOHANNESSEN: Okay.

19 MR. DRIVON: -- because I'm choosing my words
20 carefully. We have no direct information that any of
21 the generators or Enron have -- have destroyed documents
22 pertinent to this investigation. We do have information
23 that others -- we do have some suggestion, specific
24 suggestion that others from whom we have requested
25 documents may have destroyed documents pertinent to this

49

1 investigation, but that is -- those are not the
2 generators nor Enron. And -- and I'm not at liberty now
3 to discuss that further.

4 MR. JOHANNESSEN: Okay. Thank you.

5 CHAIRMAN DUNN: Okay.

6 MR. DRIVON: That was the first question. I
7 forgot the other two.

8 MR. JOHANNESSEN: That's -- I -- I understand
9 where we're going with it. Thank you. I appreciate it.

10 CHAIRMAN DUNN: Senator Morrow.

11 SENATOR MORROW: Mr. Drivon, I want to nail
12 this down for my own understanding. The responses that
13 you received to the effect that we're not going to
14 destroy records, we haven't destroyed records, we're not
15 going to destroy records and they might be required by

16 other areas of the law to comply with that, is that in
17 response by or is that the response of one
18 representing -- one individual representing all the
19 generators or each generator individually?

20 MR. DRIVON: The responses vary, Senator, from
21 zero on the part of some of them, and I'd have to -- I'd
22 have to look to see who did what exactly, to a
23 reasonably detailed letter by one of the generators, and
24 I apologize to that generator for not being able to
25 remember who it was right now, on this issue. All of

50

1 the responses have been individual. Some of the
2 responses have been verbal, some of them in person at
3 the meetings, some have been telephonic and some of them
4 have been by way of letter.

5 SENATOR MORROW: I mean, if you could perhaps
6 make a mental or a just a notation to yourself, I would
7 like to know specifically. I mean, frankly, it would be
8 damned stupid for anyone to destroy any documents with
9 or without an agreement, but I want to know who said
10 they wouldn't, regardless.

11 MR. DRIVON: Mental notes won't work for me.
12 Give me a second here.

13 CHAIRMAN DUNN: Okay. Sorry about that.
14 Mr. Drivon, I want to talk very quickly about the
15 confidentiality agreements that you have referenced.

16 I know that there have been several proposals
17 submitted to the Committee. If you could zero in on the
18 most recent proposal by the generators and advise the
19 Committee as to why you have found that particular
20 proposal unacceptable.

21 MR. DRIVON: Yeah, Senator, and with respect to
22 some of those, I'll indicate how far back our objections
23 go.

24 CHAIRMAN DUNN: And before you go on,
25 Mr. Drivon, my apologies. I want to note for the record

51

1 here, as you have been speaking, responses keep coming
2 in. We have just been served with a response on behalf
3 of Williams, apparently addressing it request by
4 request. It appears each of them, as I just page
5 through here, begins with a variety of different
6 objections, but we just received that.

7 We also just received a -- actually, it's not a
8 response. It says "Objections to Subpoenas Duces Tecum
9 of Mirant, Americas Development, Inc., and Mirant
10 America's Generation, Inc.," so for the record, these
11 have literally been just received by the Committee.

12 SENATOR BOWEN: You know, Senator Dunn, with
13 your permission. If this kind of behavior occurred in
14 the courtroom of any judge in this state, whether

15 federal or state, it would not be tolerated, you know.
16 You don't get to, in the middle of the proceeding, show
17 up with your answer. And I think this Committee ought
18 not -- ought not tolerate that kind of a response.

19 MR. DRIVON: I -- I don't know whether I'm
20 supposed to ask you a question, but I will. Did -- are
21 any of those legal filings?

22 CHAIRMAN DUNN: What they are drafted in the
23 form of and I have one here --

24 MR. DRIVON: Did they go to court, anybody?

25 CHAIRMAN DUNN: No. It simply says in the

52

1 pleading, the caption page that it's the Senate of the
2 State of California, Select Committee to Investigate
3 Price Manipulation of the Wholesale Energy Market. I'm
4 referring to up here, and in the caption is who we are
5 and what this document appears to be.

6 MR. DRIVON: I -- I have just been handed a
7 copy of the Williams response. And -- and it appears,
8 beginning on line 11 of the first page, where they set
9 forth the forum under which they are responding, that at
10 least Williams agrees that this Committee has
11 jurisdiction over this issue.

12 CHAIRMAN DUNN: Okay. Okay. Let's move
13 quickly to the confidentiality agreement and just

15 confidentiality agreement this Committee offered to the
16 generators.

17 MR. DRIVON: The confidentiality -- the latest
18 permeation that we received was June 26th at 7:04 p.m.
19 from the East coast, so I don't know whether that means
20 7:04 our time in the evening or 7:04 their time. I
21 believe we got it at a little after 4:00 in the
22 afternoon or 5:00 or something.

23 It is a several-page document, 14 to be exact.
24 It contains a number of provisions which are
25 unacceptable in my opinion and in the opinion of, I

1 believe, the Chair.

2 First of all, specifically on page 2, they
3 include within the definition of protected materials any
4 testimony that this Committee might take. They reserve
5 the right to declare that confidential, including
6 testimony taken at hearings or by way of deposition.

7 There's a great deal of discussion here,
8 starting at page 3, of something they call a
9 nondisclosure certificate that has a number of problems.
10 We discussed all of these problems with it -- with them.
11 So far, both of these concerns date back to the original
12 bullet points from sometime in April.

13 Additionally --

15 Senator Johannessen has a question.

16 MR. DRIVON: I'm sorry.

17 SENATOR JOHANNESSEN: What does the
18 nondisclosure certificate, what does that mean? I mean,
19 in laymen's term, I understand what it means, but what
20 does it mean in legal term?

21 MR. DRIVON: Well, what they are saying, that
22 they -- the demand is paragraph 3, subdivision E of
23 their proposal, that the term "authorized person" shall
24 mean a person who has signed a nondisclosure
25 certificate, and who is a current or replacement

54

1 Committee member who is not a party to a suit or
2 proceeding against the respondent, and who is not, any
3 committee member, any -- anybody, basically, staff
4 member, et cetera.

5 And questions have been raised as to whether or
6 not, for instance, after a -- an order like this was
7 entered into, whether the Senate would lose its ability
8 to appoint a replacement member to this Select
9 Committee, if that replacement member was precluded by
10 contract insisted on by the generators because he or she
11 refused to sign a nondisclosure certificate.

12 SENATOR JOHANNESSEN: Okay. Thank you.

13 MR. DRIVON: They sought to preclude us from

15 any way with any market participant, any interested
16 parties, such as an IOU, or basically any political
17 subdivision, or anyone who is really involved with the
18 energy situation in California, at least in California
19 they wanted to preclude us from using that person
20 because they wanted to preclude us from disclosing any
21 documents to that person, to any such person.

22 They wanted to preclude us, and all of these
23 points basically go back to the original, that no
24 document shall be disclosed in any manner, except an
25 authorized person who is engaged in the conduct of

55

1 Committee's investigation that -- that would probably
2 preclude us, were we to sign it, from turning
3 information over to other state agencies who might
4 reasonably expect to receive that information, should
5 the Committee develop it, and would require those
6 agencies to enter into their own fight with respect to
7 the production of those documents, separate and apart
8 from what we had already acquired.

9 CHAIRMAN DUNN: Excuse me, Mr. Drivon. Senator
10 Johannessen.

11 SENATOR JOHANNESSEN: I'm sorry, you have to
12 keep educating me, but we have the investigations being
13 done by attorney general as well. Being that that is

14 a -- in the criminal arena, I think, Mr. Chairman, we --
15 that cannot come to us, but this -- does the agreement
16 we are now talking about, does this preclude us from
17 giving information to the Attorney General?

18 MR. DRIVON: Senator Johannessen, it's a short
19 paragraph. It's an important point, it says, "Permitted
20 uses: Protected materials shall be treated as
21 confidential by the Committee and by each authorized
22 person in accordance with a certificate exercised
23 pursuant to paragraph 10.

24 "Protected materials shall not be used, except
25 as necessary, for the conduct of the Committee's

56

1 investigation, nor shall they be disclosed in any manner
2 to any person, except an authorized person who is
3 engaged in the conduct of the Committee's investigation
4 and needs access to the protected materials in order to
5 carry out that person's responsibilities in the
6 Committee's investigations. Authorized persons may make
7 copies," et cetera.

8 SENATOR JOHANNESSEN: That answers my question.
9 Thank you very, very much.

10 MR. DRIVON: I think the answer is yes, but
11 it's there for everyone to interpret.

12 SENATOR JOHANNESSEN: Okay.

14 MR. DRIVON: Thank you. They also wanted in
15 paragraph 5 us to afford them an opportunity to review
16 the documents that were received from other entities
17 like the ISO and stamp them secret or confidential if
18 somehow they had been -- that designation had been
19 missed by the other respondent, even though those
20 documents --

21 CHAIRMAN DUNN: Mr. Drivon, my apologies, a
22 little confusion on the Committee. Can you identify
23 exactly which protective order you are addressing?

24 MR. DRIVON: I'm referring to the most recent
25 permeation found on page 5.

57

1 CHAIRMAN DUNN: Which tab are you in in the
2 book?

3 MR. DRIVON: We have got a tab problem. I
4 frankly don't know whether that's a part of -- of the
5 general book or you asked me to be prepared to talk
6 about it.

7 CHAIRMAN DUNN: We believe it is. We believe
8 it is.

9 MR. DRIVON: Here is the book.

10 SENATOR MORROW: We're talking about the June
11 26th proposal, Mr. Drivon?

12 MR. DRIVON: Correct, correct.

13 SENATOR MORROW: I have what appears to be a
14 draft thing. It would be under the Duke tab.

15 CHAIRMAN DUNN: That's the one. That's the
16 one, Senator Morrow. And, again, go right to the page
17 and paragraph you're at now, Mr. Drivon.

18 MR. DRIVON: It's page 5 of the draft
19 agreement. Paragraph 5, which should be right in the
20 middle of the page labeled "Information acquired from
21 third parties." And have we got it there?

22 SENATOR MORROW: (Senator Morrow nods head).

23 MR. DRIVON: Thank you. Basically this
24 paragraph was a request by them that should we receive
25 terms from other parties like the ISO, the PX, that they

1 should be allowed to review such of those documents as
2 would apply to each of them and have the opportunity to
3 designate those documents as confidential in their own
4 way, and subject to this confidentiality order, even
5 though those documents would already be subject to a
6 confidentiality order as produced, or not confidential
7 according to the prior production. We felt that -- that
8 two levels of confidentiality was inappropriate.

9 In -- on paragraph -- excuse me, page 7, there
10 is a paragraph having to do with request for access that

12 this Committee. And the last sentence, which appears on
13 page 8, indicates on the second line of that page that
14 they should have standing to assert objections with
15 respect to such disclosure because this paragraph
16 previously set up their responsibility to defend against
17 Public Records Act requests that might be concerning
18 their documents to the Committee. In other words,
19 somebody comes to the Committee with a Public Records
20 Act request. They would have the obligation to respond
21 to that as it applied to their documents.

22 The last sentence or half of that sentence
23 says, "and shall have standing to assert objections to
24 such disclosure." We have indicated in the past and
25 indicated again that we were not willing to confer the

1 general legislative investigation Committee overall
2 blanket protection to them by way of -- of allowing them
3 to assert that on our behalf as well.

4 I -- there are other problems, but moving to
5 the bottom line. If you look at page 12 of that
6 particular order, after all of these pages, the last
7 sentence in the order, proposed order, is "each
8 respondent continues to reserve the right to contest the
9 scope and effect of any requests made of it by the
10 Committee or otherwise," which means to me that the last

12 agreed to do anything.

13 CHAIRMAN DUNN: One of the questions that --
14 that I wanted to pose to you for the Committee's sake is
15 you referenced before that the Committee has entered
16 into confidentiality agreements already with, I believe,
17 ISO, the PX and DWR and I believe, and correct me if I'm
18 wrong, Mr. Drivon, on the verge with LEDWP; is that
19 correct?

20 MR. DRIVON: And we have been assured by LEDWP
21 that the confidentiality agreement that we have
22 suggested will be acceptable to them.

23 CHAIRMAN DUNN: Okay. And I believe the
24 generators have at various times suggested that we as a
25 Committee embrace the confidentiality agreement that was

60

1 signed between the Attorney General's Office and various
2 of the generators; is that correct?

3 MR. DRIVON: That is correct. And as a matter
4 of fact, that agreement was reduced to a court order
5 filed and signed May 21st of 2001 in the Los Angeles
6 Superior Court, signed by judge somebody with bad
7 handwriting -- I apologize, Your Honor -- but that is
8 correct, they have urged that we as a committee sign the
9 document similar to the one signed by the Attorney
10 General.

11 CHAIRMAN DUNN: Okay. And can you explain any
12 differences in your opinion that occur -- that exist
13 between the Attorney General's scope of work that would
14 address their confidentiality concerns versus this
15 Committee's work.

16 MR. DRIVON: Yes. In -- in looking at the
17 document that they provided with us in the order with
18 the Attorney General, many of the provisions were the
19 same as the ones that they included in our -- the
20 proposal that they made to us, at least in substance
21 they were similar.

22 The -- the role of the Attorney General in the
23 conduct of his investigation is statutory and
24 functionally and procedurally different than that
25 encompassed by this Committee's directive. The Attorney

1 General deals with issues both civil and criminal with
2 respect to action that may be taken in court.

3 Our role here is to act as a legislative
4 committee. Our authority is found in -- in different
5 law. Our -- our authority is found primarily in the
6 constitution of the State of California as modified, not
7 very substantially in my opinion, by certain limited
8 statutes. The -- the authority of the Attorney General
9 is otherwise found in the law and is primarily

11 totally different goals and assignments.

12 CHAIRMAN DUNN: Is it fair to say that the
13 Attorney General's concerns re confidentiality as a
14 result of what you just stated are different than what
15 would govern this Committee?

16 MR. DRIVON: Yes.

17 CHAIRMAN DUNN: Okay. I want to bring it to a
18 focal point at this point. It's -- it's -- I'm sorry,
19 Senator Bowen.

20 SENATOR BOWEN: Maybe I'm asking the wrong
21 person but, you know, the obvious conflict is the extent
22 to which the Public Records Act and the legislature's
23 obligation to engage in a public process conflicts with
24 what would otherwise be confidentiality provisions and
25 they certainly are colliding head on here.

62

1 We have the public clamoring for more public
2 information, not less. And I don't know what, if any,
3 law there is with regard to when the legislature can
4 keep matters confidential, but it would be useful, and
5 perhaps we need to ask leg counsel, to help us
6 understand what -- under what circumstances we can keep
7 work product confidential.

8 CHAIRMAN DUNN: Okay.

9 SENATOR BOWEN: Without falling afoul of the

11 it's called -- Burton Grunsky, Burton....

12 CHAIRMAN DUNN: And if I may also ask,
13 Mr. Drivon, briefly touch upon the parameters of the
14 confidentiality agreement the Committee has consistently
15 offered to the generators, which I believe, correct me
16 if I'm wrong, is identical to that offered to DWR, ISO,
17 PX, LEDWP, et cetera.

18 MR. DRIVON: Other than making it more
19 pertinent, I guess you'd say, to some individual entity.
20 Obviously, if it's the ISO, it has to talk about the
21 ISO, et cetera.

22 Other than that, the substance is the same and
23 basically we agree to maintain confidentiality of
24 information provided to the Committee, to the extent
25 that it's required to be kept confidential pursuant to a

1 FERC tariff.

2 If it's a trade secret pursuant to California
3 Civil Code Section 3426.1(d), if it is a sensitive
4 proprietary financial document under the Hoffman Case,
5 we agree that the documents will be used only to further
6 purposes of the Committee, only shared with Committee
7 members, staff and members of the Committee and such
8 experts as consultants may be retained; in other words,
9 limiting it to the appropriate persons who need the

10 information to do the job of the Committee, including
11 use of those materials in advising, preparing for, or in
12 testimony before the Committee, covering the requests
13 that may be made pursuant to Government Code Section
14 6250 or 9072, et seq., that's the Public Records Act
15 information -- or issue in setting forth a procedure
16 that is to be used if we get a 9075 request, government
17 code section.

18 Setting forth that we will provide them
19 notification if, at least 10 days ahead, if we intend to
20 use any of the documents that they have labeled
21 confidential in a public hearing, or otherwise release
22 them. We agree to give them 10 days notice and give
23 them that 10 days to obtain interdiction by a court, if
24 it's appropriate, and that we'll refrain from releasing
25 any material during that 10-day period.

1 And if during that 10-day period there's a
2 binding court order, we would abide by that court order
3 and reserving to ourselves specifically, although I'm
4 certain we don't need to do that, that we would reserve
5 the right to share information with the Attorney General
6 or other appropriate government agencies.

7 Those are the basic points that we have been
8 willing to agree to for virtually the three-month period

9 of time we're talking about.

10 CHAIRMAN DUNN: And as of today, there has been
11 no agreement from any of the generators or Enron to that
12 protective order or confidentiality agreement?

13 MR. DRIVON: The universal response has been
14 that our suggestions are inadequate for their purposes.

15 CHAIRMAN DUNN: Okay. I believe at one point
16 in time there was discussion regarding a Sacramento
17 document depository.

18 MR. DRIVON: We made a suggestion -- we were
19 reminded by the respondents that there were a number of
20 entities, agencies and others who were governmental
21 entities, et cetera, who were interested in these
22 documents and had a legal right to some of them or all
23 of them.

24 I made the suggestion to them, with your
25 permission and concurrence, that a depository of

1 documents be established near the Capitol under their --
2 that is to say the generator's control, that they have
3 the opportunity to choose that depository, secure that
4 depository and provide that depository with people to
5 take care of it and control it.

6 That access to the documents in that depository
7 would be limited to those persons who were authorized by
8 some subpoena, some court order or some agreement with

9 them to make access to those documents. That no
10 document would be photocopied, otherwise memorialized or
11 removed from the premises without the concurrence of the
12 keeper of the key, them, and that they would maintain
13 control over their documents.

14 We wouldn't have to have multiple disclosure of
15 those documents, multiple copies made, and we could go
16 look and see what we exactly needed and avoid a lot of
17 expense, time and effort on behalf of a lot of people
18 and allow them to maintain their own security.

19 They declined, several times.

20 CHAIRMAN DUNN: Okay. Just to follow a few
21 follow-up phone calls -- phone calls, questions and at
22 least as far as my questions, I'm through.

23 You may have mentioned before, Mr. Drivon, but
24 I believe there was a point in which a priority list of
25 documents was provided to various of the recipients of

1 the June 11th subpoenas, indicating that production of
2 these by a certain date would be acceptable for
3 determining compliance as to today. Can you share with
4 us the specifics.

5 MR. DRIVON: Yes. And I hope the choir isn't
6 singing for me.

7 CHAIRMAN DUNN: We -- we don't know.

8 MR. DRIVON: The Committee had a meeting with
9 the generators that I have previously discussed. That
10 meeting took place a week and a half ago or so. I can't
11 find the date. I previously talked about it.

12 At that meeting, I was determined to relay to
13 them a -- a shorter list of documents that we would
14 consider acceptable as a sort of first wave compliance,
15 not as a substituted list, but as a list that they could
16 more directly deal with, since they had been complaining
17 of the voluminous nature of this.

18 At that meeting we did that. I -- I delineated
19 such a list orally that was -- they kept stopping me so
20 they could write it down. We followed that up, I can't
21 recall the exact date, in writing by way of e-mail to
22 each of them.

23 CHAIRMAN DUNN: Have we received any response
24 to that request?

25 MR. DRIVON: Not unless it's contained in the

1 documents that have come since I sat down in this chair.

2 CHAIRMAN DUNN: Okay. Last question I have for
3 you, Mr. Drivon. Since April 5th, excluding what may
4 have been -- may have been received this morning, or
5 even up until now, have we received any documents in
6 response to the document requests or subpoenas?

7 MR. DRIVON: Other than the document retention

8 policies from some of them, and excluding today, the
9 answer is zero.

10 CHAIRMAN DUNN: Any questions from any of the
11 members?

12 What we're going to do for the court reporters'
13 sake is take 10 minutes. We will start right back up at
14 1:00 o'clock, at which time we invite any of the
15 representatives of the generators or Enron to provide
16 commentary.

17

18 (12:49 p.m. - 1:06 p.m.)

19

20 CHAIRMAN DUNN: Let's begin. Mr. Kleinman, you
21 look like you're ready to go. Come on up and we're
22 going to swear you in. Mr. Pratt, your duties for
23 Mr. Kleinman.

24 MR. KLEINMAN: I think we can avoid that.
25 Senator Dunn, I'm here personally to deliver the

1 response of the Duke entities to the subpoena which we
2 understood was due today, Senator, that today was the
3 compliance date.

4 CHAIRMAN DUNN: I need you to speak in the mic.
5 I know you don't want to, that's evident.

6 MR. KLEINMAN: No, that's fine, Senator.

8 SENATOR BOWEN: He's probably accustomed to
9 standing to address the...
10 MR. KLEINMAN: Somebody asked me that, Senator
11 Bowen.
12 SENATOR BOWEN: Yes.
13 MR. KLEINMAN: And I did come personally to do
14 that because it was clear from the recitation, the
15 history that you heard, I have acted as something of a
16 liaison as Mr. Drivon explained in response to a
17 question from Senator Peace. And I personally want to
18 thank Mr. Drivon for making the response that he did.
19 I acted solely in a liaison function to
20 facilitate the Committee's work with different
21 generators. It would be easier, we all thought, and I
22 think it's true of people in the Committee who
23 participated, for the Committee to be able to work
24 through a single point of contact rather than deal
25 one-on-one. And it is only in that respect that I

1 forwarded things from one to the other and acted to try
2 and facilitate that, but be that as it may, I did come
3 personally to deliver Duke's response.

4 CHAIRMAN DUNN: Give to it Jody right there,
5 the Sergeant at Arms.

6 MR. KLEINMAN: And I would ask in that regard

8 June 14th, which he countersigned, which confirms the
9 basis upon which I acted as a mail person of sorts, as
10 well as the fact that today was to be the compliance day
11 be put into the record.

12 But I would like to make clear to the Committee
13 that it is our intention to begin complying promptly,
14 and you will see two important things I think in the
15 response that I have just given and, unfortunately, I
16 did not bring multiple copies enough for all the
17 Committee members.

18 You will see that first of all, Duke has been
19 served by subpoenas with unfortunately the wrong
20 entities. There is an affidavit at the end which
21 identifies the fact that of the recipient three
22 companies, two, while California registered and
23 operating, neither one has anything to do with the
24 electricity generation or marketing business. The --
25 one is in the gasoline business. It's simply the wrong

1 ones, they would not have had the documents.

2 The third one is not registered to do business
3 here and does not have an agent for service of process,
4 but you will also see that notwithstanding those
5 objections, because it is our policy to comply and
6 facilitate your investigation, we will begin promptly to

7 make available to the Committee on terms akin to ones
8 which Mr. Drivon mentioned.

9 A considerable number of documents, and I'm
10 talking in the tens of thousands that we will make
11 available for inspection. We will find a facility. We
12 will put the documents there in the terms of
13 Mr. Drivon's alternative suggestion of mid May.

14 You will also see that we will do it in terms
15 of the proposed confidentiality agreement that you,
16 Senator Dunn, provided to us in mid May signed by you.

17 We will make some slight modifications,
18 hopefully, and I'm hopeful that we will be able to work
19 that out. As Mr. Drivon mentioned, I called him this
20 morning to confirm that he will be available when this
21 is over. And as we have done before, we will sit and
22 talk and iron out some details.

23 This, from our perspective is an interim
24 measure. There are some objections that we have to the
25 subpoena. There are scope questions. There are also

1 obviously privilege questions, attorney-client
2 privilege, things of that sort that I have never heard
3 suggested by any committee member are not entirely
4 legitimate objections to a subpoena of the breadth of
5 the one that you have served.

7 find a place. I have to get the documents, so I'm
8 hopeful you will bear with us for at least a short
9 period of time, and I do mean short, but that is the
10 basis upon which you will see, from what I just provided
11 to you, which I came out here to give you personally, is
12 the way in which Duke will respond and facilitate this
13 Committee's objections.

14 We continue to believe that a confidentiality
15 order of the type that we have provided is an
16 appropriate thing to do and I do wish to discuss it with
17 the people that we have discussed it with somewhat
18 further. My draft has some provisions which, frankly,
19 we did think were acceptable to the Committee and,
20 hopefully, we'll be able to close all of that out
21 relatively quickly.

22 My discussion with Mr. Drivon would be on
23 behalf of Duke only, although if others wish to adopt
24 those changes or modifications, presumably they will.

25 But I appreciate the opportunity to appear

1 before you. The only thing that I would like to have in
2 the record and be clear about, however, because my name
3 was mentioned so frequently, is that in mid May I
4 received a letter from Mr. Drivon which, when I received

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6 His letter to me in mid May at the end said, "I
7 want to express my appreciation for your diligent
8 efforts in attempting to work out this difficult issue,"
9 referring to the confidentiality issue. "It is clear
10 that you were proceeding in good faith with me. I am
11 sorry our efforts were not more successful." So I'd
12 like that comment reflected in the record also, but that
13 is all that I came to say.

14 CHAIRMAN DUNN: Okay. Let me, for
15 clarification purposes, if I may, Mr. Kleinman. It's my
16 understanding that you are here and the presentation
17 here again is specifically on behalf of Duke, not any of
18 the other generators, Enron, et cetera?

19 MR. KLEINMAN: That's correct.

20 CHAIRMAN DUNN: Okay. All right. Senator
21 Johannessen, did you have some questions?

22 SENATOR JOHANNESSEN: I was just curious. Do
23 you see any reason why the confidentiality agreement
24 hasn't been reached by this stage, because we have
25 discussed that for several months? That's number one.

1 And number two, my concern is on the
2 destruction of documents. Why -- why doesn't your
3 client want to sign this kind of agreement, there is to

5 that done that way?

6 MR. KLEINMAN: I suppose it's always difficult
7 when a citizen is asked, will you sign an agreement with
8 a government agency that says I will not violate the
9 law. I would think any citizen would say to the
10 government agent that asked him that, I'm already bound
11 by the law. And indeed we wrote to Senator Dunn, my
12 partner did, on June 1 as reflected in the chronology
13 that Mr. Drivon reviewed.

14 Duke Energy has taken and will continue to take
15 appropriate steps to ensure that relevant information is
16 retained. We are well aware of not only the scope of
17 the requests that have been made of Duke entities by
18 this body and others, and have taken steps to assure
19 that documents be retained. And I think that this
20 company has operated in good faith in that regard.

21 What we understood when we received the
22 subpoena was that we were being asked to produce
23 documents. And as you will see from the response that I
24 have just provided to the chair, that is, indeed, what
25 we continue immediate -- very soon to do.

1 SENATOR JOHANNESSEN: I hope you understand
2 that it doesn't give me that fuzzy and warm feeling that
3 you just gave me that answer.

5 respect, Senator Johannessen. I think from the
6 perspective of the recipient of the subpoena, of the
7 breadth of this document, which as you know calls for a
8 very broad array of business documents, we are already
9 under requirements that we take steps to make sure that
10 reasonably, in good faith, documents are retained.

11 And we intend fully to comply with that
12 obligation and have noted that obligation for some
13 months. And I think that is what a citizen does when
14 confronted, having been served with a subpoena of this
15 kind.

16 And, indeed, the commitment which was given in
17 the letter that I refer to on June 1 was not a
18 commitment made on behalf of a specific entity to which
19 the April 5 request was addressed which, frankly, was a
20 different entity.

21 And it was not limited, nor would it be limited
22 in a future-going basis to the three entities who are
23 the subjects -- who are the recipients of the subpoenas.
24 Even though two of them don't participate in this
25 business at all and the third doesn't do business here

1 and doesn't have a registered agent for service of
2 process. But notwithstanding that, we made the
3 good-faith effort, and I would think we might be one of

4 the first to the step and say, here is where we are to
5 the Committee in the letter of June 1.

6 SENATOR JOHANNESSEN: Okay. Thank you. I
7 think I understand your direction.

8 CHAIRMAN DUNN: We have got Senator Morrow,
9 then Senator Peace.

10 SENATOR MORROW: Mr. Kleinman, thank you for
11 being here this afternoon. I need to clarify. The
12 Chairman, of course, has your response that hasn't been
13 made available to all the other Committee members as of
14 yet. Let me, just so I can get an idea, it's been
15 contained in that document -- well, first of all, is
16 Duke prepared to deliver into the possession of this
17 Committee any documents or physical materials requested
18 by the Committee today?

19 MR. KLEINMAN: No. What we are doing right now
20 is assembling tens of thousands of pages of documents
21 which were previously produced or provided to, or access
22 to which was given to the office of the Attorney General
23 and the California Public Utilities Commission. It is
24 an enormous amount of material. There will be an index.
25 What we were doing is in accordance with the suggestion

1 that you heard Mr. Drivon discuss before the recess.

2 SENATOR MORROW: And when you make appropriate
3 copies and compile all that, it's your intention,

4 according to this response, to make it available to the
5 Committee subject to the provisions of a protective
6 order?

7 MR. KLEINMAN: It is our intention to make it
8 available to the Committee pursuant to the execution of
9 a confidentiality agreement, very close. We have some
10 nits and lice that we want to talk -- I want to talk to
11 Mr. Drivon about, but very similar to the one which we
12 were furnished by Chair Dunn -- by Senator Dunn in, I
13 believe, mid May.

14 CHAIRMAN DUNN: It was approximately, let me
15 clarify, Senator Morrow for you, when we were in the
16 midst of the confidentiality discussion, Mr. Drivon,
17 correct me if I misstate any of this or -- Mr. Kleinman.
18 We had -- the Committee's special counsel had prepared a
19 draft confidentiality provision which we felt had
20 addressed the concerns that were -- had legal basis from
21 the generator's perspective and that was satisfactory to
22 us. I delivered a signed copy from my signature seeking
23 their signature on it and I believe that's a copy you're
24 referring to.

25 MR. KLEINMAN: I believe so. That's correct.

1 CHAIRMAN DUNN: All right.

2 MR. KLEINMAN: In other words, we're saying,
3 let's move forward. We want to facilitate your

5 let's do it the way the special counsel to the Committee
6 has suggested. In terms of protective arrangement,
7 let's move forward on the basis in which Senator Dunn
8 suggested.

9 SENATOR MORROW: Okay. You indicated you want
10 this to be accomplished in a short period of time and --
11 and you mean short. I mean, forgive me for trying to
12 nail you down on this, but exactly how much time is it
13 going to take?

14 MR. KLEINMAN: I would think a week to 10 days.

15 SENATOR MORROW: A week to 10 days. One other
16 question while I have you here as a representative of
17 Duke, if you know. The response, assuming that you do
18 comply and that there is a protective order that
19 everybodys agrees with and is signed and documents are
20 provided, would that include copies of the log book
21 entries from control rooms of the South Bay facility in
22 San Diego?

23 MR. KLEINMAN: I believe the South Bay logs
24 will be there.

25 SENATOR MORROW: Okay. Thank you.

1 CHAIRMAN DUNN: Okay. Senator Peace.

2 SENATOR PEACE: Well, for the record, I want --
3 I would like to assure on a going-forward basis that

5 Committee don't end up being perceived to be the -- the
6 least cooperative of the group by virtue of their effort
7 to cooperate. There's a stark contrast between Duke's
8 presentation and negotiation versus Enron's response.

9 And I will say, editorially, I think when we
10 get through all those documents and these things, we're
11 going to find out there's a stark contrast between the
12 conduct in the marketplace between Enron's trading
13 practices, a couple other companies that I won't name,
14 and -- and while Duke has been the subject of this
15 hearing, I certainly have my criticisms and I have some
16 pretty strong feelings about what the contractual
17 obligations are on the South Bay plant specifically.

18 There were leaders and there were followers in
19 this chain of events going back to last -- really, the
20 previous fall as we worked up to the last spring. And I
21 would hope that each of the companies would recognize
22 their individual interest in individually cooperating.
23 I appreciate the fact that -- I have read through your
24 letter, it was a quick read, I may have missed
25 something, but I don't think I see you contesting the

1 jurisdiction of this Committee and its right to
2 investigate; is that correct?

3 MR. KLEINMAN: This -- this letter does not

4 contest the jurisdiction of the Committee to
5 investigate. We're proposing to provide you with a
6 substantial amount of documents, and given the volume,
7 in awfully short order.

8 SENATOR PEACE: That has been generally
9 consistent with Duke's interaction, whether it be with
10 the Governor's office or -- or in other circumstances,
11 as this thing has -- has evolved. And -- and we may
12 have some differences of opinion and some criticisms,
13 but I -- I'm anxious to make it clear that we -- we
14 ought to -- "we," meaning those of us doing the
15 investigating, ought to distinguish between the
16 corporate behavior, or citizen corporate behavior of
17 some of the really bad actors who we know the least
18 about because, frankly, they acted more -- in a more
19 shadowy-type fashion and with more middlemen in this
20 chain of events, typically being marketeers and traders
21 as opposed to actual operators and generating facilities
22 and, therefore, it's much more difficult to get to the
23 information.

24 And so while it may be painful, as -- as we
25 visit our -- our perception of -- of your positions that

1 are articulated now or actions the company took over the
2 past few months and we may ultimately have substantial

4 actions, I would hope that you don't interpret that as
5 our lack of understanding of the -- the fundamental fact
6 that there -- there are some -- some players in this --
7 this drama that -- whose conduct is dramatically
8 distinctive and apart from even those which we may --
9 may argue about here in the context of Duke's operation.

10 MR. KLEINMAN: Can I share a perspective with
11 you, Senator?

12 SENATOR PEACE: Sure.

13 MR. KLEINMAN: You can talk to Mr. Drivon about
14 this when this is over. He gave me the courtesy last
15 Thursday afternoon of calling and advising me that the
16 witnesses who were going to appear, whose identities we
17 had not been told of before, even though we know there
18 were witnesses who were going to be appearing were going
19 to be former Duke employees, it left us very little time
20 to respond.

21 There was some allegations we had some idea
22 about before, but I said to Mr. Drivon that my sense
23 from what I was hearing was that things like plant logs
24 could be seriously misinterpreted and that, indeed, when
25 you look beneath the facts, and I think there will be

1 facts which will be unfolding in the next few days,
2 there are truths which will emerge which will take you

4 And I encouraged him that when you have
5 information of the sort which came out last Friday, call
6 us first. We'd love to sit and talk to you and work
7 through the information in the documents, and I make
8 that invitation on a forward-going basis.

9 SENATOR PEACE: I appreciate that comment, but
10 you should know from, at least my perspective, that we
11 have some differences of opinion about the manner in
12 which the plant was operated. Now, I believe there were
13 leaders and followers in the market. And -- and in my
14 communications with all of the -- all of the inlaws and
15 the outlaws go all the way back to last summer and your
16 folk, as others will corroborate, that I argued
17 strenuously for the -- the -- those participants in the
18 market who had a history of corporate citizenship,
19 rather, to intervene at FERC last summer and had some --
20 some of these folks intervened then, last summer, then
21 Mr. Enron's letter here would look -- would be a lot
22 more credible. Because at a time when the settlement
23 conference should have occurred last summer, Enron was
24 leading the charge to not have that happen and most of
25 your counterparts were at best silent.

1 And the major culpability, irrespective of what
2 ultimate determinations are made on these tiers, as the

4 this Committee, that there are tiers of culpability.
5 You can fail to meet the FERC tariff requirements, that
6 indeed is a FERC jurisdictional decision to make or
7 ultimately a Federal court decision as FERC has a pretty
8 lousy track record in court.

9 Second, you go beyond that, you could have
10 violated -- actually conducted yourselves in a manner
11 which was illegal above and beyond the FERC tariff
12 issues and that could visit you in either federal or
13 state legal determinations.

14 And -- and the only way we can get to that
15 information and distinguish between those levels, and
16 you get to the last level, which is potential criminal
17 culpability. And there may or may not be violations in
18 each of those three elements in stages of those things,
19 but we can't get there and distinguish those without
20 getting information.

21 The irony of Enron today pointing to the FERC
22 settlement conference which Mr. Hecker promised me he
23 was going to do in August, but because he was convinced
24 there was a way he could remain FERC chairman, even in a
25 Bush presidency, he didn't put in the order. And that's

1 the real honest-to-God history of why there wasn't a
2 FERC settlement conference last summer, because

4 he wanted to be chairman -- chairman of the Committee,
5 even if Bush became President.

6 Now, he did suggest the parties participate in
7 a settlement. And I would argue that history would --
8 would suggest that all the parties would have benefited
9 from volunteering to participate in that settlement and
10 I will guess most of the parties wish they had.

11 But to have Enron -- to -- who, you know,
12 essentially the architect of the whole concept, who
13 continues to push in Japan for the same market model
14 that they pushed for and got in this state with a
15 separate ISO and PX and today as we speak are in Japan
16 arguing for it, and with all their disinformation, and
17 go over there and get the -- and -- and mobilize the
18 business community here to try and influence the Public
19 Utilities Commission to maintain direct access and at
20 the same time, send this letter to us today, including
21 the reference to the now settlement hearings, which no
22 doubt they will be arguing strenuously against providing
23 any reasonable settlement and arguing exclusive FERC
24 jurisdiction, and then adding insult to injury by making
25 reference to the recent court decision in which Enron's

2 as part of a continued, orchestrated effort to frustrate
3 investigations by -- by being able to use the very
4 letter they provided us today.

5 I'm going to give you some free public advice.
6 Separate yourself from Enron and the other two or three
7 radical bad apples because the longer the rest of the
8 industry participants refuse to stand up and identify
9 the real culprits, the higher the price that all the
10 companies and their stockholders are going to pay,
11 because you are going to all be taken down the chute
12 with them.

13 CHAIRMAN DUNN: Okay. I'm sorry, Senator
14 Bowen.

15 SENATOR BOWEN: Thank you. I also want to
16 clarify that my -- my great frustration here is with
17 getting a letter from Enron on the day that a subpoena
18 is due, explaining all the reasons why we don't have
19 jurisdiction, after being promised one thing and only
20 one thing, and that is that we would get their document
21 retention policy and then not having -- not having even
22 gotten that. That's just not -- not acceptable.

23 I do have a question. What is the -- what
24 power does the Senate have? Do we have only the power
25 as a whole in a contempt proceeding to cause someone to

2 Cement Company, or could we, for example, impose, say,
3 nine billion dollars worth of fines, which would solve
4 the whole problem?

5 CHAIRMAN DUNN: Let me offer at least the
6 Chair's perspective, Senator Bowen, although we are
7 seeking the advice of legislative counsel in this area
8 that has not been tread for quite some time, since that
9 case that you referred to, the Battelle decision, in
10 1929, to the best of my knowledge.

11 It appears procedurally, and for everybody's
12 edification, that should this Committee find
13 noncompliance, we then find contempt. That's within the
14 jurisdiction of this particular committee.

15 Under the procedures set out in Government Code
16 9400, and after, this Committee, if such a finding was
17 made of contempt, must prepare and submit a report of
18 that contempt to the full Senate and any decisions
19 regarding action upon that contempt rest with the full
20 Senate.

21 There isn't a whole heck of a lot of guiding
22 legal principles about what the full Senate can or
23 cannot do, other than what is necessary and reasonable
24 in carrying out its duties in acting upon the contempt.

25 As Senator Bowen referred to, that case in 1929

1 related to an individual witness who refused to respond
2 to a legislative subpoena and ultimately was jailed.

3 SENATOR BOWEN: Right. And the issue was the
4 control of the market price of cement and the
5 suppression of free competition.

6 CHAIRMAN DUNN: Correct. We talked about this
7 before in the sense that the Battelle decision resulted
8 from a Senate investigation into potential collusion in
9 the cement industry as a result of certain bidding
10 practices that were discovered at that time.

11 So, Senator Bowen, at least from the chair's
12 perspective, there isn't much guiding legal precedent
13 other than the full Senate can act based upon what it
14 deems to be just and reasonable, given the contempt.

15 SENATOR PEACE: Sounds like a case with a
16 pretty firm foundation, though.

17 CHAIRMAN DUNN: I won't comment on that one.

18 Senator Bowen, did you have any further
19 questions?

20 SENATOR BOWEN: No, I didn't. I mean, I do --
21 it is clear from the earlier decision, the McCarthy
22 decision, which I think is 1866, which basically says
23 that the person in question will be thrown in jail until
24 they are cured of the contempt.

25 CHAIRMAN DUNN: Correct.

1 SENATOR BOWEN: Purged of their contempt,
2 sorry.

3 CHAIRMAN DUNN: Right.

4 SENATOR BOWEN: That that's a remedy, but the
5 question of whether or not a financial penalty could be
6 imposed is of interest to me.

7 CHAIRMAN DUNN: That's understood.

8 SENATOR BOWEN: That is, after all, the whole
9 point of this exercise is not to put anybody in jail or
10 not to have boxes and boxes of documents, it is to
11 restore sanity to the market for electricity in this
12 state and to get ourselves to a position where people
13 are not paying outrageous prices for what is an
14 essential commodity in this economy.

15 CHAIRMAN DUNN: Which --

16 SENATOR JOHANNESSEN: Mr. Chairman.

17 CHAIRMAN DUNN: Let me to go Senator
18 Johannessen and then Mr. Kleinman you have something.

19 MR. KLEINMAN: Just a last well comment that I
20 was going to make.

21 CHAIRMAN DUNN: Senator Johannessen.

22 SENATOR JOHANNESSEN: If possible, I would like
23 to come back to the basic charge of this Committee and
24 any -- at this point, any talk of punishment and so
25 forth is obviously somewhat premature, I would think.

1 But could I ask you, do you have any idea, I think you
2 mentioned something like 10 days to get all the -- week
3 to 10 days to get all the papers together that is
4 necessary and -- and to find a place in which these
5 10,000s of documents, whatever, could be placed. Do you
6 have any idea where that could be?

7 Would that be somewhere out of the state, or
8 are you going to keep them here in the Capitol or what
9 are you going to do?

10 MR. KLEINMAN: I haven't sat down to talk with
11 people. I came in late last night, having just learned
12 that this had gotten rescheduled. I have some homework
13 to do and I would ask that you just bear with me a
14 little bit.

15 SENATOR JOHANNESSEN: Well, you understand --

16 MR. KLEINMAN: I'm keenly aware of the
17 Committee's urgency and desire to proceed quickly. I
18 think that certainly the chair and its counsel will
19 confirm that I am one who has been very responsive. On
20 Mother's Day, when my 7-year-old had surgery, it's -- we
21 have been busy.

22 SENATOR MORROW: We will -- we will confirm the
23 representation, that is absolutely correct,
24 Mr. Kleinman.

25 MR. KLEINMAN: Thank you.

1 SENATOR JOHANNESSEN: What I'm hoping to relay
2 to you is that if -- if it is any place not very easily
3 acceptable to the members, time and place available,
4 that I think I would look at that very carefully as to
5 the intent of the individual that put it together.

6 MR. KLEINMAN: I hear you, Senator.

7 SENATOR JOHANNESSEN: All right. Thank you.

8 CHAIRMAN DUNN: Any other senators wish to make
9 comment? Let me -- Mr. Kleinman, anything further?

10 MR. KLEINMAN: I just -- as I said at the very
11 beginning, I did not come here to testify as such. I do
12 want to have the June 14 letter that I sent to
13 Mr. Drivon, which --

14 CHAIRMAN DUNN: I believe it's part of the
15 record already, isn't it, Rhonda? Was that -- it's in
16 the binders that Mr. Drivon was referring to when he
17 went through his testimony and will be part of the
18 record.

19 MR. KLEINMAN: And I -- I just wanted to be
20 sure that in the following regard, I feel something of a
21 sense of duty to other generators who, because my acting
22 as communications vehicle as well as reviewing the
23 letter, really did understand that today was the day for
24 compliance. And -- and I would hate to see them
25 reviewed as having waited until the end because they had

1 been told they should have done it earlier rather than
2 waiting to the end to be misunderstood, and that's why,
3 in fairness, I think it should be.

4 The other thing I wanted to say is, I mean, you
5 will see from the letter we have provided a substantial
6 set of objections, because we think that the responses
7 are objectionable in a number of ways. We have some
8 difference of views on the extent to which state
9 jurisdiction applies in an area regulated by the federal
10 government. Reasonable lawyers disagree.

11 But I think the important point here is, from
12 the perspective of this afternoon, which started this
13 morning's hearing, we're going to be willing to make
14 documents available to the Committee.

15 CHAIRMAN DUNN: Senator Johannessen.

16 SENATOR JOHANNESSEN: Clarification. Did you
17 just mention that there are indications that some of the
18 people who are involved in this did not realize that
19 this request was being made of them to prepare these
20 documentation were to be provided?

21 MR. KLEINMAN: No, to the contrary, Senator.
22 As I listened to the earlier proceedings before the
23 break, I was a little concerned that the Committee might
24 have believed that because people had not provided
25 written responses until today, they had acted

1 improperly.

2 And I want to make sure that the record has the
3 document which, to me, and I think to some other people
4 who do the same thing that I do for subpoena recipients,
5 understood that today was the day to deliver. I don't
6 want them to be misunderstood for being lagged because
7 it came today, that was my only point. They understand
8 today, and the flurry of what you received certainly
9 confirms that.

10 SENATOR JOHANNESSEN: Thank you.

11 MR. KLEINMAN: If -- if there's nothing
12 further, I will go see -- I was going to see a real
13 estate agent.

14 SENATOR PEACE: I'd like to get a clarification
15 on your last statement. Do you mean to incorporate your
16 reference with respect to other generators; do you mean
17 to include the Enron letter? Is that reflective of the
18 work you have been doing with the others?

19 MR. KLEINMAN: No, the substance of the Enron
20 letter, like the substance of all other generators'
21 responses is solely their own decision. The only thing
22 which was in common was that the day for compliance
23 would be the same.

24 And I undertook to get written confirmation of
25 what the date for compliance would be on behalf of all,

1 rather than have the chair or your counsel respond to, I
2 don't remember how long the list is now, individually.
3 I undertook to do it for all of it, was I thought easier
4 for you all and easier for them and I just think that
5 that should have been made clear.

6 That's all.

7 SENATOR PEACE: Thank you.

8 MR. KLEINMAN: Is that fair?

9 CHAIRMAN DUNN: Uh-huh.

10 MR. KLEINMAN: Thank you.

11 CHAIRMAN DUNN: Okay. Any other questions from
12 any of the senators? Let me update everyone even
13 further, since as we have been speaking, there are
14 additional responses that have come in.

15 We have now received various boxes from Dynegy.
16 I'm simply referring to the cover letter from the
17 Pillsbury-Winthrop law firm in San Diego referencing
18 that in the boxes are documents numbered 1 through
19 18,603 that now apparently sit in my office, literally,
20 on the second floor.

21 So we have as of 1:40 now, if I assume the
22 letter to be correct, slightly over 18,000 documents
23 from Dynegy. We have approximately 1,800 documents from
24 Reliant. We have Mr. Kleinman on behalf of Duke
25 representing that they will establish a Sacramento

1 document depository as previously proposed, I believe
2 back in mid May, and will begin producing immediately.

3 For the remainder, which includes AES,
4 Williams, Mirant, Enron, we have a variety of written
5 responses, no documents, no witnesses that have appeared
6 on their behalf, but a variety of written responses that
7 we have not had an opportunity to review as of this
8 point in time.

9 The one question that -- that, at least in the
10 chair's mind that I have, is whether compliance with the
11 subpoena is satisfied with a written response that
12 includes objections to every single one of the requests.

13 Senator Morrow.

14 SENATOR MORROW: Before -- and I want to
15 address that, Mr. Chairman. You bring up a good point,
16 but I just want to clarify with regard to AES when we
17 started, there was some question in my mind whether or
18 not they were actually going to respond with written
19 documents.

20 CHAIRMAN DUNN: Mr. Drivon, if would you
21 respond to that question.

22 MR. DRIVON: I suggested earlier that AES might
23 be in the same boat as NRG with respect to when requests
24 were made and the period of time that they have had to
25 respond. We agreed with NRG when they approached us

1 that the time might not have been as extensive for them
2 as it has been for the generators and we would treat
3 them separately and differently.

4 We include AES in the list you have before you
5 only because they did not contact us and ask us for
6 similar treatment. Had they done so, we would have
7 afforded it to them.

8 SENATOR MORROW: So if I can, Mr. Chair, let me
9 clarify.

10 CHAIRMAN DUNN: Actually, if I may interrupt,
11 Senator Morrow, my apologies. I believe, and I have
12 received note that we do have witnesses from some of the
13 other generators that would like to make some comments
14 as well.

15 SENATOR MORROW: Let's hear them.

16 CHAIRMAN DUNN: For those representatives from
17 any of the other recipients of the subpoenas, if you
18 would come forward.

19 MR. LARREA: I guess it's only me.

20 CHAIRMAN DUNN: I guess it's only you.

21 MR. LARREA: My name is John Larrea. I work
22 for the Williams corporations.

23 I have been asked to make a special appearance
24 by my company because, due to the shortness of the
25 notice, our lead attorney, Alex Goldberg, is currently

1 engaged in FERC negotiations with settlements. I'm here
2 to read a statement by Williams.

3 CHAIRMAN DUNN: Before you do, we're going to
4 put you under...

5 [Thereupon the witness, John G. Larrea, swore
6 to tell the truth, the whole truth, and nothing but the
7 truth.]

8 MR. PRATT: Thank you. You may sit.

9 MR. LARREA: May I proceed?

10 CHAIRMAN DUNN: Please.

11 MR. LARREA: Thank you. "Williams remains
12 willing to assist this Committee by providing relevant
13 documents for its investigation. However, in order to
14 do so, Williams must have a mutually agreeable
15 protective order governing this Committee's use and
16 disclosure of this confidential data."

17 "As you know, Williams has been engaged in
18 negotiations with this Committee to narrow the scope of
19 the request to a reasonable, relevant and manageable
20 body of documents consistent with the legal objections
21 as well as to establish a realistic and mutually
22 agreeable timetable for production.

23 "Williams remains open and invites further
24 negotiations with the Committee and will continue to
25 engage in its good-faith effort to reach an agreement on

1 an approach to this production request, which will
2 satisfy both this Committee's need and Williams'
3 rights."

4 Also, I just have been informed, and at least I
5 have been given to understand that Williams will be
6 agreeable to depositing documents, both nonconfidential
7 and confidential documents, in the document depository.

8 CHAIRMAN DUNN: Okay. But my understanding,
9 and, John, I don't know if you can even clarify it,
10 since I understand you are basically here just to read
11 the statement, that it will not do so until a -- a
12 confidentiality agreement satisfactory to Williams has
13 been executed.

14 MR. LARREA: In terms of depositing the
15 documents, that I do not know. My understanding right
16 now is that we may be willing to do that without the
17 confidentiality agreement --

18 CHAIRMAN DUNN: You don't know?

19 MR. LARREA: But to release those documents, we
20 would require a protective order.

21 CHAIRMAN DUNN: Okay. The reason it's -- it's
22 important that we know this very specific question that
23 I'm asking you.

24 MR. LARREA: I believe I can probably get you
25 an answer to that before the close of business today.

1 CHAIRMAN DUNN: It's -- unfortunately, I can't
2 defer to that because the Committee, I suspect, will be
3 prepared to take some action. We're going to debate
4 that here openly in a moment, and waiting until the end
5 of the day won't give us the ability to act or not act.
6 So we're just going to have to operate on what you've
7 offered already, unless there's something further.

8 MR. LARREA: No, but if I do receive an answer
9 to that fairly quickly because I --

10 CHAIRMAN DUNN: As soon as you get it, you
11 know, if the committee has not adjourned, we'll
12 certainly consider it.

13 MR. LARREA: Okay.

14 CHAIRMAN DUNN: If you can obtain that
15 information before.

16 MR. LARREA: Okay.

17 CHAIRMAN DUNN: And any other questions for
18 this particular witness from the Committee?

19 Seeing none, thank you.

20 MR. LARREA: Thank you.

21 CHAIRMAN DUNN: Any other representatives of
22 any of the generators or of Enron that wishes to come
23 forward. Okay. Seeing none, I want to make one --
24 couple of clarifications very quickly and then share my
25 own observations.

1 First of all, as the testimony was proceeding I
2 was advised, and I want to make sure we are all
3 understanding that technically the production of
4 documents, they sit within the authority of the Rules
5 Committee, not this Committee, and so any
6 confidentiality agreement will have to be approved by
7 the Rules Committee and they control that.

8 Certainly as we -- if in fact we were to
9 negotiate a successful -- an acceptable confidentiality
10 agreement, we would do everything in our power to insure
11 approval by the Rules Committee, but I want to make sure
12 this is on the record so that everybody understands that
13 technically it's the Rules Committee and only the Rules
14 Committee can bind the full Senate, so I want to make
15 that clarification.

16 Also, as far as the purpose of the Committee, I
17 want to make sure everybody understands what was the
18 original submission as far as the Committee itself. The
19 Committee is investigating the wholesale electricity
20 market and price manipulation on that market to
21 determine whether, in fact, there are any legislative
22 actions or steps that must be taken to address
23 dysfunctional behavior on the wholesale electricity
24 market or price manipulation.

25 It is not the purview of the Committee to do a

1 criminal investigation, that rests within the hands of
2 the Attorney General's office and I want to make sure
3 everybody knows that that is not the focus of this
4 particular committee.

5 Just a couple comments from the chair. In
6 hearing what we have heard, I -- it's been -- not quite
7 sure how to label it, to be honest with you -- the fact
8 that we have received certain documents, we have no idea
9 what they are, and assurances from Mr. Kleinman about
10 Duke's willingness to respond, but that it has taken us
11 to today to get those sort of responses is unfortunate
12 and disturbing, from this chair's perspective.

13 I appreciate Mr. Drivon's efforts, and in
14 particular Mr. Kleinman's efforts in trying to reach
15 some compromise, but the fact of the matter is, from my
16 perspective, the concerns about confidentiality do not
17 technically serve as a proper objection to the subpoena
18 itself. And we do not have, at least in my view,
19 compliance, at least with respect to some of those who
20 received the subpoenas on June 11th.

21 Again, I appreciate the fact that Reliant has
22 delivered some documents, as has Dynegy, and appreciate
23 Mr. Kleinman's effort in coming here. I know he
24 traveled a long way in making representations on behalf
25 of Duke. My hope would be that the other market

1 participants that we focus in on in this investigation
2 will share Duke's position with respect to a local
3 Sacramento document depository.

4 We made that suggestion almost two months ago.
5 We think it will ease the burden for all involved in
6 actually making the -- the investigation, it will
7 streamline it, at least in my view, from everybody's
8 perspective.

9 John, I see you raising your hand. I think you
10 want to add something. I suspect we know what it
11 probably is, but go ahead.

12 MR. LARREA: Yes, we -- I have just received
13 word from my company that we are willing to deposit into
14 a Sacramento depository, subject to the confidentiality
15 agreement that you proposed in May.

16 CHAIRMAN DUNN: Okay. Which is --

17 MR. LARREA: We have a couple of concerns about
18 it, but we will be willing to discuss those with
19 Mr. Drivon.

20 CHAIRMAN DUNN: Basically, the same position as
21 expressed by Mr. Kleinman on behalf of Duke?

22 MR. LARREA: Yes.

23 CHAIRMAN DUNN: Okay. All right. Thank you.
24 And we appreciate that. So let me open it up if any of
25 the other committees (sic) have comment they would like

1 to make at this point in time.

2 SENATOR CHESBRO: Mr. Chairman.

3 CHAIRMAN DUNN: Yes, Senator Chesbro.

4 SENATOR CHESBRO: Well, I'm sorry that I have
5 had to come and go a few times so I may have missed part
6 of the discussion that's covered, so I apologize if I
7 did. But to what extent do we know whether or not the
8 documents that are submitted will or will not be
9 available to the Attorney General for criminal
10 investigation purposes?

11 CHAIRMAN DUNN: Mr. Drivon, correct me if my
12 perception or recollection is incorrect, but I believe
13 that the confidentiality agreement that we proposed, the
14 Committee, to the generators and Enron back in May, that
15 John and also Mr. Kleinman referred to, allows this
16 Committee to share documents with the Attorney General's
17 office.

18 MR. DRIVON: As well as any other appropriate
19 government agency who has -- has proper investigation
20 going on.

21 SENATOR CHESBRO: Thank you.

22 CHAIRMAN DUNN: Okay. Other comments. Senator
23 Bowen. Senator Morrow.
24 Senator Morrow.

1 clarify. It seems like we're whittling it down a little
2 bit here. I mean, with regard to at least Reliant and
3 Dynegy, they have provided physical documents. I think
4 it's important for the Committee to go through those
5 documents, determine the extent of compliance with the
6 subpoenas issued by the Rules Committee. Reliant,
7 Dynegy are the easy ones. It would appear that, of
8 course, Duke and now Williams has indicated a desire to
9 cooperate, Duke mentioned within 7 to 10 days.

10 I hope Williams would be consistent with that
11 as well, too. Subject to Mr. Drivon's protective order
12 that was previously discussed, I mean, that at least
13 goes some way in my book. That would appear to leave,
14 among the companies that were subpoenaed, Mirant and
15 Enron in terms of at least no physical documents
16 produced.

17 CHAIRMAN DUNN: And I believe AES.

18 SENATOR MORROW: AES as well. Okay. And they
19 may have responded in the form of a pleading or
20 objection, but basically the response is, we're not
21 going to comply; is that correct?

22 CHAIRMAN DUNN: Yeah, again, not having read it
23 from cover to cover, as we just paged through those
24 other written responses, it appears that there are
25 objections asserted to each of the requests. They may

1 at some point here say, yes, we will produce, but we
2 have not had an opportunity to review those.

3 SENATOR MORROW: My concern, nobody is coming
4 in here and saying we produced any documents?

5 CHAIRMAN DUNN: That's correct, Senator Morrow.

6 SENATOR MORROW: If we have a filing with this
7 Committee merely saying that we object and we're not
8 going to produce any documents unless such and such
9 happens, that at least, to my satisfaction, doesn't
10 comply with what is requested in the subpoenas.

11 And we as a Committee have a charge to continue
12 with our investigation in as expeditious and judicious
13 manner as possible. I mean, for us not to take any
14 further action with regard to at least companies here
15 today, frankly, I don't think would be consistent with
16 our charge.

17 And so, I mean, I would propose, at least as a
18 motion, I think this might actually resolve some things
19 in the long end, that this Committee should find with
20 regard to Mirant and Enron and AES, that by virtue of
21 their noncompliance with the subpoenas that were issued
22 by the Rules Committee, that they be found in contempt
23 by this Committee and that that be forwarded on to the

24 Rules Committee for preparation of an official report to
25 the Senate and that we schedule a vote on that in this

104

1 Committee at least after 10 days.

2 I would recommend to July 10th, as I understand
3 the way it is supposed to go down in reviewing the
4 government code and such, on July 10th that we meet,
5 giving all the companies time to purge the contempt and
6 for us to make a determination as to some of the other
7 companies, whether or not they have complied. Of
8 course, if they have complied, we don't have to forward
9 that on to the Senate and I think a motion would be
10 appropriate along those lines.

11 CHAIRMAN DUNN: Okay. Let me, if I make sure I
12 understood the motion, Senator Morrow, that the motion
13 is that this Committee find noncompliance and,
14 therefore, contempt as to AES, Mirant and Enron; that
15 that contempt -- this Committee through Rules prepare a
16 report for forwarding to the full Senate and that on
17 July 10th, this Committee will vote on that report
18 before forwarding to the full Senate for action on the
19 report.

20 And that if between today and July 10th those
21 in which a contempt is found comply, that that contempt
22 be purged and we do not forward the report on to the

24 for contempt Reliant, Duke, Dynegy, Williams and NRG, at
25 least as of this point in time.

105

1 SENATOR MORROW: At this point in time, I think
2 that would be appropriate.

3 SENATOR CHESBRO: Mr. Chairman.

4 CHAIRMAN DUNN: Senator Chesbro.

5 SENATOR CHESBRO: I'm assuming that either
6 implicit or perhaps you could add for those other
7 companies, we would be reviewing the documents and
8 determining whether or not they -- I mean, at this point
9 documents have been submitted. We have not had the
10 chance to review them to determine whether or not they
11 comply with the Committee's subpoenas, right?

12 CHAIRMAN DUNN: Let me offer some clarification
13 so that it's clear and, Senator Morrow, correct me if
14 your intentions on the motion were different.

15 That this Committee will review the documents
16 that we have received from Duke, excuse me, from Reliant
17 and Dynegy to determine whether in fact there is
18 compliance and we will revisit the issue of compliance
19 and/or contempt as to those two on July 10th.

20 The same applies to Duke, although we do not
21 physically have any documents in our possession. We
22 have had Mr. Kleinman appear before the Committee and

24 days there will be compliance and a depository
25 established.

106

1 We have the same on behalf of Williams,
2 assurances as were set forth by Duke and NRG, we'll
3 exempt simply because they are in that unusual situation
4 that was identified by Mr. Drivon, but we reserve the
5 right to revisit the issue as contempt as to those,
6 Reliant, Duke, Dynegy and Williams and NRG when we
7 gather on July 10th. Correct, Senator Morrow?

8 SENATOR MORROW: That's correct.

9 CHAIRMAN DUNN: Okay. Senator Peace.

10 SENATOR PEACE: Mr. Chairman, just as a matter
11 of clarification. Did I understand the earlier
12 conversation that AES was amongst the companies that
13 were not originally contacted? The reason why I asked
14 that question is -- is it -- does Williams operate --
15 does Williams have a contract on all the AES facilities,
16 are they the actual...

17 MR. DRIVON: That's my understanding.

18 SENATOR PEACE: And so in combination, if --
19 if -- I may have misunderstood you, maybe it was just
20 NRG, I thought I heard counsel indicate that AES had not
21 been originally contacted and sort of in an abundance of
22 caution, with respect to assuring we are being
23 consistent, the combination of the fact that Williams is

24 the actual operating -- who is in control of the
25 operations of all AES output, as I understand it, I

107

1 wonder if at the first blush it would be more accurate
2 to contain the motion to Enron and --

3 CHAIRMAN DUNN: And Mirant.

4 SENATOR PEACE: -- and Mirant.

5 Would you have any objection to the suggested
6 amendment by Senator Peace?

7 SENATOR MORROW: No, I wouldn't. That would be
8 fine.

9 CHAIRMAN DUNN: Okay. And any reason from your
10 perspective, Mr. Drivon, that we wouldn't go in that
11 direction?

12 MR. DRIVON: I believe that to be appropriate
13 and I do have one question. And that is my
14 understanding of what is happening with respect to the
15 generators who are not included in this contempt motion,
16 is that their date for compliance would be extended now
17 to the July 10th date; is that -- is that correct?

18 CHAIRMAN DUNN: That's correct, Mr. Drivon. So
19 let me clarify that for the record. What this Committee
20 will do is, assuming that Senator Morrow's motion
21 passes, is we will extend the compliance date to the

23 10th, 2001, and the entities to which the extended
24 compliance date are Reliant, Duke, Dynegy, Williams, NRG
25 and AES.

108

1 MR. DRIVON: Did you say NRG?

2 CHAIRMAN DUNN: I did. Yes, I did.

3 Okay. Any other comments or concerns with
4 respect to the motion? Okay. We have the motion, I
5 believe it's accurately stated. Sir?

6 MR. BITTMAN: Mr. Chairman, may I address this
7 Committee?

8 CHAIRMAN DUNN: You may.

9 MR. BITTMAN: My name is Robert Bittman. I'm
10 an attorney for Mirant and I came at the last moment. I
11 was at the last meeting that the Committee's counsel and
12 the other counsel have. I am not intimately familiar
13 with all the negotiations that have gone on, and as you
14 know, that Mirant has filed a response.

15 We filed our response, we objected or formerly
16 we objected to the request for documents. We wish to
17 cooperate with the Committee and I believe that Mirant
18 may well be amenable to what procedure that counsel for
19 the Committee and the Chairman have suggested in terms
20 of a depository.

21 I just -- I myself am not familiar enough with

23 that we will do all of that. But I believe that I can
24 represent, because I know generally that Mirant has
25 agreed internally to produce documents, that that

109

1 proposal may be acceptable, so on behalf of Mirant, I
2 would like to be included in the group that is extended
3 to July 10th.

4 CHAIRMAN DUNN: Counsel, you're in a difficult
5 position, as you know, because we had the representative
6 from Williams who, prior to our adjournment, got the
7 actual authority to make such a commitment and that
8 we're not acting on his belief.

9 I fully assume that your belief is well
10 intentioned, I don't take anything different from your
11 comments, but because we're about to vote, I don't think
12 we have the time here to wait and determine as you make
13 the various calls to the client to determine that.

14 There's some solace here and that is that we
15 have stated that with respect to the motion that's been
16 made, if in fact there is compliance by July 10th, the
17 contempt will be purged and, in fact, there will be no
18 report to the full Senate with respect to any further
19 actions.

20 I understand that may not be completely

22 situation here as well, since we're about to take a vote
23 and adjourn the Committee, Counsel.

24 So, I think barring your ability to bind your
25 client to that agreement, we will move forward the with

110

1 the motion as made.

2 SENATOR JOHANNESSEN: I have a question.

3 CHAIRMAN DUNN: Anything else you'd like to
4 add, Counsel?

5 MR. BITTMAN: It's just my understanding from
6 witnessing that what happened in the audience that
7 Mr. Kleinman, at least said, and I have not talked to
8 him, but indicated that he wasn't -- he thought he would
9 be able to reach an agreement with Mr. Drivon, counsel,
10 and that -- well, I just don't understand exactly --

11 CHAIRMAN DUNN: What he was able to confirm to
12 the Committee is that his client hereby agrees to
13 deposit its documents in a Sacramento depository that
14 will commence immediately. And so that, you know, yes,
15 he had one or two, as he described, I believe, minor, I
16 don't want to misstate his testimony, minor issues that
17 he believes can be resolved with respect to the May
18 confidentiality agreement that this Committee submitted
19 to the various market participants.

20 I don't -- at least I'm reading from you,
21 Counsel, that you are not authorized to make that sort

22 of commitment that Mr. Kleinman did.

23 MR. BITTMAN: Oh, I think I can go that far. I
24 think I can go that far that we are willing to deposit
25 documents into a depository in the Sacramento area and

111

1 subject to the proposed confidentiality agreement that
2 you submitted with some discussions with Mr. Drivon.

3 CHAIRMAN DUNN: Okay.

4 MR. BITTMAN: I think we are willing to do
5 that.

6 CHAIRMAN DUNN: Okay. The problem is we have
7 also got Mr. Starbird's representation that that is not
8 an acceptable confidentiality agreement. This is where
9 we're kind of stuck here, Counsel, and I'm not trying to
10 put you in an unfair position, that's not the intent of
11 the Committee, but I'm concerned about ability to bind
12 here and what's being bound.

13 Any comments from any other Committee members.

14 Senator Morrow.

15 SENATOR MORROW: Mr. Chair, I mean, we're not
16 stuck. I mean, the procedures are very clear. And I'm
17 sorry, that lack of preparation or not having full
18 authorization, not stepping forward is not a defense to
19 something like this. You are going to be made whole,
20 assuming that your company provides the requested
21 documents before the July 10th date when we come back

23 to the motion.

24 CHAIRMAN DUNN: Okay. Senator Peace.

25 SENATOR PEACE: Just as a matter -- is anybody

112

1 from Enron here?

2 CHAIRMAN DUNN: We have had no appearances from
3 Enron, Senator Peace.

4 SENATOR PEACE: Are there any -- any -- is
5 there any additional count that could be added to
6 Mr. Morrow's motion? I mean, after all, it is a
7 contempt motion.

8 CHAIRMAN DUNN: And is there something you're
9 proposing, Senator Peace?

10 SENATOR PEACE: I just don't know whether or
11 not there's any precedent for the mere failure to appear
12 and have any representation at all would add additional
13 gravity, at least I think there's some worthiness of
14 distinction between the temperature of attitude toward
15 the investigation as evidenced by -- not only by their
16 lack of appearance, but by their letter versus Mirant's
17 position.

18 CHAIRMAN DUNN: Mr. Drivon.

19 MR. DRIVON: Senator Peace, I can tell you that
20 I spoke with counsel for Enron this morning, who

22 11:00 o'clock. I believe that he was accurate. We had
23 their response before 11:00 o'clock. In addition to
24 that, he said that they would not otherwise appear here
25 today.

113

1 SENATOR PEACE: That's their -- Enron's counsel
2 from San Diego?

3 CHAIRMAN DUNN: Yes.

4 MR. DRIVON: I'll take your word for it.

5 SENATOR PEACE: Yes. It's just a personal
6 thing.

7 CHAIRMAN DUNN: Understood.

8 SENATOR PEACE: When --

9 MR. DRIVON: I gathered that.

10 CHAIRMAN DUNN: Okay.

11 MR. BITTMAN: Senator Morrow, may I make
12 another statement?

13 CHAIRMAN DUNN: One last comment, then the
14 motion is going to be ruled upon or voted upon.

15 MR. BITTMAN: I just -- Senator Morrow said
16 that, you know, I should be ready and you're right, I
17 guess, I should be ready. We received notice of this, I
18 flew across the country into the wee hours of this

20 more knowledge than I could not be here because of not
21 enough notice.

22 And I'd ask the Committee if I could just step
23 out in the hallway and contact the person with the
24 knowledge, with the authority to -- to bind, because
25 this is obviously something grave to find any person or

114

1 entity in contempt is -- is not something that -- that
2 Mirant wants to be saddled with. We want to cooperate
3 with the Committee and I'd just ask the Committee for,
4 you know, a brief few minute recess.

5 SENATOR MORROW: Mr. Chair, I would defer to
6 your discretion on that. If indeed, if we're not
7 looking at an untimely period of time, if you can make a
8 telephone call and report back to this Committee in the
9 next five or 10 minutes, then I'd be amenable to that
10 request.

11 CHAIRMAN DUNN: You got five.

12 MR. BITTMAN: Thank you. May I be excused?

13 SENATOR CHESBRO: Although I would like to say
14 that, you know, the gravity of this didn't arise today.

15 CHAIRMAN DUNN: No.

16 SENATOR CHESBRO: It's been around and so I --
17 and I'm not speaking for you personally, you may have
18 just been called about this and may indeed be in the
19 position you are in, but I'm speaking to who has

20 retained you, certainly has been aware of the gravity of
21 this for some time.

22 CHAIRMAN DUNN: Comments are well made. Five
23 minutes. Five minutes.

24 SENATOR PEACE: Do you have any appropriate
25 game show music?

115

1 (2:06 p.m. - 2:11 p.m.)

2 CHAIRMAN DUNN: Okay. Let's bring everybody
3 back. Also the representative from Williams. John, are
4 you still here? Is he still around?

5 You're back.

6 MR. BITTMAN: Yes, Robert Bittman again for the
7 record. I have spoken to Mr. Starbird, Mr. Chairman,
8 and he has given me authority to agree on behalf of
9 Mirant to produce several thousand -- multiple thousands
10 of pages of documents that we have already gathered,
11 into a facility in Sacramento pursuant to the
12 confidentiality order you proposed of -- in May.

13 CHAIRMAN DUNN: Okay. I want to do some
14 clarification -- hold on, Senator Johannessen, I think
15 this will probably cover it.

16 My understanding, and welcome any disagreements
17 of Committee members, of Mr. Kleinman's representations
18 is that they will produce the documents that are

20 agreement, and that all responsive documents would be
21 put into the depository.

22 You said that your -- Mirant would produce
23 certain documents. Is it your agreement that Mirant
24 will produce all responsive documents to a document
25 depository here in Sacramento?

116

1 MR. BITTMAN: Let me first answer, I did not
2 hear Mr. Kleinman's testimony that way.

3 CHAIRMAN DUNN: Understand.

4 MR. BITTMAN: And the reason is because I
5 personally have been involved in the gathering of these
6 documents, and it is an enormous task. And you are
7 talking probably hundreds of thousands, if not millions
8 of pages of materials. So physically there is no way
9 that Mirant and I frankly doubt -- I can't speak, I have
10 not talked to the other generators about numbers of
11 documents, but if -- if they could physically do it.
12 Maybe they can. Maybe they've -- somehow. We've got a
13 lot of people working on this, but there's just no way
14 physically that we can get them all.

15 CHAIRMAN DUNN: Let me correct something. I'm
16 not suggesting to you that this Committee will demand
17 that all millions, potentially, documents are in that
18 depository by July 10th. And while certainly we want a

20 by July 10th, we understand your practical limitations.

21 My concern, however, is that Mr. Kleinman's
22 representation was that they would produce, they are
23 agreeing to produce all responsive documents to the
24 subpoenas and putting them in a depository.

25 Your comments left a little wiggle room on that

117

1 particular issue. Is it your commitment on behalf of
2 Mirant that they will produce to a document depository
3 in Sacramento all responsive documents to the subpoenas?

4 MR. BITTMAN: When?

5 CHAIRMAN DUNN: As soon as practically
6 possible. What I'm trying to nail down here is I -- on
7 behalf of this Committee, subject to any comments from
8 the rest of the Committee members, I'm not going to
9 accept that we, Mirant, will produce certain documents
10 in a document depository. That's not acceptable. What
11 we want is the documents that are responsive to the
12 subpoenas produced in the document depository here in
13 Sacramento.

14 Now, maybe that's one and the same, but we want
15 clarification to insure that we are talking the same
16 thing here.

17 MR. BITTMAN: I'm sorry, I'm in slow class
18 today. Could you explain that again, I don't --

19 CHAIRMAN DUNN: I'll be happy to.
20 MR. BITTMAN: I don't mean -- I just --
21 CHAIRMAN DUNN: I'll be happy to. Don't worry,
22 I have done that to many judges. I'm sorry, I didn't
23 hear that question, Judge, can I have it again. I'll be
24 happy to.
25 Your comment, if I heard it correctly, was that

118

1 on behalf of Mirant, you agree that Mirant will produce
2 certain documents and produce them in a document
3 depository here in Sacramento. It's the use of that
4 limiting language such as "certain" that is of concern.
5 What Mr. Kleinman on behalf of Duke agreed to,
6 and why we -- we excluded them from the motion to compel
7 that has been made, was that he agreed to produce all
8 documents responsive to the subpoenas. I want to insure
9 that your commitment on behalf of Mirant is equal to
10 that made by Mr. Kleinman.
11 MR. BITTMAN: I -- I think Mirant wants to
12 reserve --
13 SENATOR JOHANNESSEN: Mr. Chairman, I'm sorry,
14 I have some things I have to do.
15 CHAIRMAN DUNN: Okay.
16 MR. JOHANNESSEN: You know, I'm sorry, you
17 know, I appreciate the attempt, and I can spot a wiggler
18 from long way back, and with all due respect to you, I

19 understand what you are doing, I understand it, but this
20 is the time and place that we made that decision and,
21 Mr. Chairman, I call for the question.

22 CHAIRMAN DUNN: Okay. I -- I would agree with
23 Senator Johannessen. I think, Counsel, and it's no
24 criticism of you, you are in a difficult spot, we get
25 that. At least this chair's recommendation would be

119

1 that we go forward with the motion as made by Senator
2 Morrow and we'll vote on it up or down, and if Committee
3 members are concerned with your position, their votes
4 could reflect that.

5 Again, I want to assure you, I know that if the
6 motion should pass, that -- that no individual or
7 company wishes to be on the receiving end of a contempt
8 finding. But, again, that contempt can be purged,
9 assuming by July 10th that we move forward, for example,
10 your client, in the direction that Mr. Kleinman had
11 expressed.

12 One more clarification, gentlemen, before we do
13 it, and the reason I asked you to come back is there was
14 some confusion among the Committee members that your
15 commitment on behalf of your client is equal to that
16 made by Mr. Kleinman on behalf of Duke; is that a
17 correct characterization?

18 MR. LARREA: I believe the -- I believe that

19 the commitment was made in terms of the confidentiality
20 agreement. We would -- that a couple of things that we
21 need to discuss with -- with your attorney and clear
22 that up and then we will do the production of documents.

23 CHAIRMAN DUNN: In a document depository here
24 in Sacramento?

25 MR. LARREA: Yes.

120

1 CHAIRMAN DUNN: Senator Peace.

2 SENATOR PEACE: And all responsive questions?

3 MR. LARREA: I believe they said both -- when I
4 said confidential documents, I believe that was
5 responsive, now I cannot -- I mean, it's difficult for
6 me to say in this position, but now our issue is the
7 confidentiality issue.

8 SENATOR PEACE: Mr. Chairman, with that piece
9 of information, plus the clarification I just got and,
10 frankly, my misunderstanding, our counsel's response to
11 my earlier inquiry about exactly how AES was contacted
12 or not contacted, would lead me to suggest that we put
13 AES as well as Williams back on the list, along with
14 Enron and Mirant.

15 I think if you are going to have a rational
16 divide based on representation, responsiveness, respect
17 for process and the apparent willingness to cooperate

19 more like that of Mirant than -- than like that of
20 Duke's. And also given the fact that they have operated
21 in close approximation with AES, which apparently I now
22 understand to have not even bothered to respond, having
23 been contacted, I think, argues that they be included in
24 the motion.

25 CHAIRMAN DUNN: Senator Morrow, any objection?

121

1 SENATOR MORROW: Should I object?

2 MR. LARREA: Excuse me. I'm receiving a phone
3 call right now which may be -- this may be the response
4 to --

5 CHAIRMAN DUNN: Oh, no. We're not being --
6 taking any more breaks for phone calls. I already got
7 enough grief for doing the last one.

8 MR. LARREA: Senator, I beg your indulgence in
9 this because we did -- I was able to provide the answer
10 very quickly and I believe I can do the same thing
11 again. It's just that I'm not in a position to commit
12 the company there, but the person who is is on the other
13 line and I can provide it in a minute.

14 SENATOR MORROW: Mr. Chairman, I mean, I -- I
15 have a reputation for having the patience of Job, the
16 other members of the Committee may not, so I'm going to
17 defer to you.

19 Okay. The clarification that you are seeking, and by
20 the way, before I make any further comment --

21 SENATOR JOHANNESSEN: Mr. Chair.

22 CHAIRMAN DUNN: Hold on, Senator Johannessen.
23 I want to make a demand on behalf of all of those that
24 send representatives to this Committee. Our hope
25 certainly is we never have to be in this position again.

122

1 We may find ourselves back in a hearing like this again
2 that, as is required in any courtroom proceedings, that
3 the parties that are here, the companies that are
4 represented or the individuals that are represented
5 individuals that have full and complete authority to
6 make these decisions here.

7 Be on notice, everyone, we will not tolerate
8 this sort of phone calling again. It's the individual
9 who appears before this Committee that will not be given
10 the ability to make the proverbial phone call. Okay?

11 Now, is it your request that we give you 60
12 seconds to make a phone call to clarify the issue about
13 production of all relevant documents to the subpoena?

14 MR. BITTMAN: Yes.

15 CHAIRMAN DUNN: Make it quickly. You got one
16 minute, and then we're going to vote. No further
17 discussion.

19 of Williams, they agreed to provide all the
20 documentation, but wasn't that subject to an agreement
21 on confidentiality?

22 CHAIRMAN DUNN: It was, but -- and Mr. Drivon,
23 if you'd come forward. Did you hear Senator
24 Johannessen's question?

25 MR. DRIVON: No.

123

1 CHAIRMAN DUNN: The question is, based upon
2 Mr. Kleinman's representation that they would sign the
3 May -- the version -- the May version of the
4 confidentiality that we submitted with minor
5 adjustments, given your relationship with Mr. Kleinman,
6 do you believe that you can resolve those minor
7 adjustments without compromising the position of the
8 Committee?

9 MR. DRIVON: I -- I believe that if
10 Mr. Kleinman and I can work on that agreement and that
11 this Committee's direction is that whatever agreement
12 Mr. Kleinman and I work out will be the one that the
13 Committee requires everyone else to sign, then I think
14 there is a very good probability that he and I can work
15 this out.

16 If -- if the agreement that we previously
17 submitted is going to be tweaked separately by

18 everybody, I think it's going to be extremely difficult,
19 and another point that I would like to make.

20 My original proposal with respect to this
21 depository was that the documents would be placed in the
22 depository subject to being removed in whatever fashion,
23 only by the confidentiality agreement. In other words,
24 they get put in there, we get to go in there and look at
25 them and they get to say oh, you want to this one, this

124

1 one and this one. Fine, this one is confidential. This
2 one is confidential and this one is. Stamp them, and we
3 leave with what we want to leave with, which means --
4 and I bring this up for several reasons.

5 I have been given access to documents by large
6 companies in the past, as have others in the room. And
7 we have been provided in that depository with a two page
8 per minute copy machine, the lighting which is
9 reflective of the energy crisis that we currently are
10 involved in, and little ability to sort through
11 anything.

12 These documents, if they are going to be placed
13 in there, subject only to confidentiality order, need to
14 have -- there needs to be reasonable facilities for
15 processing those documents there and we need to have
16 access to them at all reasonable times and, you know,

18 warehouse full of documents.

19 CHAIRMAN DUNN: I don't think anybody on this
20 Committee disagrees with you, Mr. Drivon, and certainly
21 you have our backing to ensure that the proper resources
22 are provided with the establishment of document
23 depository.

24 Senator Johannessen.

25 SENATOR JOHANNESSEN: That does not -- that

125

1 doesn't give me that what I call the fuzzy, warm
2 feeling.

3 The question of confidentiality, my
4 understanding were, that that was a document to sign
5 prior to going into the vault, if you will, to look.
6 Are you saying that we do not need to wait for that
7 because that would be determined at the time of this
8 document being researched?

9 MR. DRIVON: No, no. What we need to do is
10 immediately resolve these, quote, minor problems,
11 unquote, at the same time they are putting these
12 documents into the repository, but that document that's
13 worked out between Mr. Kleinman and myself should --
14 should govern the -- the --

15 SENATOR JOHANNESSEN: The procedures.

16 MR. DRIVON: The protection with respect to the

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18 and that's it.

19 SENATOR JOHANNESSEN: What would happen if, in
20 fact, you didn't come -- not from a legal standpoint,
21 because I'm sure you have covered that, but if you can't
22 tweak the document to your satisfaction, what then
23 happens?

24 MR. DRIVON: On July -- on July the 10th, we
25 all come back here, again, and I report to the

126

1 Committee, assuming the chairman wants me to do so, that
2 we have been unable to effectuate these minor tweaks and
3 that nobody is in compliance.

4 MR. JOHANNESSEN: All right. Thank you.

5 CHAIRMAN DUNN: Okay. Just to follow up,
6 Mr. Drivon. Senator Peace raised the issue about AES.
7 Can you provide a little clarification?

8 MR. DRIVON: Well, I think my position was
9 reflective of the idea that, you know, I think all due
10 deference should be given to everybody with respect to
11 the opportunity to respond. Senator Peace's point is
12 well taken. I mean, I'm not -- I'm not sure how much
13 difference there is between AES and Williams as a
14 practical matter so, you know, it may very well be that
15 the reason we have had a little response from AES is
16 because they think Williams should be carrying the water
17 for them, so I don't know how much harm it does to

18 include them.

19 CHAIRMAN DUNN: Okay. To include within the
20 motion or to include with the rest of the group?

21 MR. DRIVON: To include within the motion --

22 SENATOR PEACE: Mr. Chairman, I just think
23 wherever you go with Williams, realistically --

24 CHAIRMAN DUNN: There we go, that's what I
25 wanted to clarify. That's what I want.

127

1 SENATOR PEACE: Where you want to go with AES,
2 include whichever side.

3 CHAIRMAN DUNN: All right. Got it.
4 John, on behalf of Williams.

5 MR. JOHANNESSEN: We are willing to provide all
6 responsive documents.

7 CHAIRMAN DUNN: All right. There we go, which
8 tracks, in the chair's opinion, the representation made
9 on behalf of Duke by Mr. Kleinman.

10 MR. LARREA: Yes.

11 CHAIRMAN DUNN: Obviously we, as you heard from
12 Senator Johannessen and others, we have got concern that
13 over the period between now and July 10th that those
14 minor issues with the confidentiality agreement, we're
15 hopeful they can be resolved. If not, as you know, and
16 please advise your client that we will be back here

18 Williams and AES, of course, on July 10th.

19 But we will accept that representation as
20 tracking directly Mr. Kleinman's representation on
21 behalf of Duke, and so thank you for providing us with
22 that clarification.

23 Okay. Let me reiterate the motion to make sure
24 that we have it very clear and then I'm prepared to call
25 the vote. The motion is, and Senator Morrow correct me

128

1 if I misstate this, the motion is that this Committee
2 find that Mirant and Enron are not in compliance and,
3 therefore, in contempt in that they have failed to
4 comply with the subpoenas issued by the Rules Committee
5 and served upon them on approximately June 11th.

6 The -- we will prepare a report to be submitted
7 to the Senate floor as to the contempt with respect to
8 Mirant and Enron and that this Committee will vote on
9 that report on July 10th -- Tuesday, July 10th at a time
10 to be scheduled.

11 However, if in fact Enron and Mirant or Mirant
12 should come into compliance within the period of time
13 from today to July 10th, that the contempt will be
14 expunged and no report will be made to the Senate floor.

15 With respect to Reliant, Duke, Dynegy,
16 Williams, NRG and AES, their compliance date is extended
17 to July 10, at which time we will -- we will reexamine
18 the issue of compliance and potentially vote on
19 noncompliance and possibility of contempt.
20 I believe I stated it correctly --
21 SENATOR MORROW: You did.
22 CHAIRMAN DUNN: -- Senator Morrow. Seeing no
23 further comment by the Committee, secretary please call
24 the roll.
25 THE SECRETARY: Chairman Dunn.

129

1 CHAIRMAN DUNN: Aye.
2 THE SECRETARY: Chairman Dunn, aye.
3 Senator Bowen.
4 SENATOR BOWEN: Aye.
5 THE SECRETARY: Senator Bowen, aye.
6 Senator Chesbro.
7 SENATOR CHESBRO: Aye.
8 THE SECRETARY: Senator Chesbro, Aye.
9 Senator Escutia.
10 Senator Johannessen.
11 SENATOR JOHANNESSEN: Aye.
12 THE SECRETARY: Senator Johannessen, aye.
13 Senator Kuehl.
14 Senator Morrow.

16 THE SECRETARY: Senator Morrow, aye.
17 And Senator Sher.
18 CHAIRMAN DUNN: And the vote. Five zero?
19 THE SECRETARY: Five zero.
20 CHAIRMAN DUNN: The vote is five zero, that
21 motion passes and this Committee -- Senator Peace.
22 SENATOR PEACE: Before you close, Mr. Chairman,
23 I want to make sure I draw your specific attention to
24 the first two pages of the actual -- I don't know what
25 you would call this, I guess attorneys have to write on

130

1 this kind of paper with the little numbers and stuff.
2 CHAIRMAN DUNN: It's true.
3 SENATOR PEACE: But this -- I mean, this is
4 a -- I don't know whether I'm more embarrassed that a
5 San Diego firm is representing Enron or I'm more
6 embarrassed from the shoddy legal work from that San
7 Diego attorney.
8 I particularly want to draw your attention to
9 the allusions to the Attorney General in this document,
10 as well as to an absolutely inaccurate description of
11 the circumstances associated with the legal action taken
12 by Senators Burton -- Senator Burton and Speaker
13 Hertzberg. And then finally on the first page an
14 apparent effort to use the currently ongoing discussions

16 participation, at least physically being there, I guess,
17 as a reason for not complying or participating in this
18 process.

19 And I want to reiterate my statement I made
20 earlier, only Enron has articulated a position that
21 challenges the right of this Committee to even
22 investigate. Irrespective of whether FERC has an
23 exclusive jurisdiction over wholesale markets has
24 nothing to do with -- with -- with issues that this
25 Committee has the right to investigate. And I think we

131

1 need to have staff and our counsel look quite directly
2 at an appropriate response to -- to this document.

3 CHAIRMAN DUNN: Okay. Thank you, Senator
4 Peace. Hearing nothing further, we are through.

5 Thank you everyone.

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7 (Proceedings adjourned at 2:32 p.m.)

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132

1 STATE OF CALIFORNIA,)
2) ss.
3 COUNTY OF SAN JOAQUIN.)
4
5 I, Dennis G. Peyton, Certified Shorthand
6 Reporter of the State of California, do hereby certify:
7 That I am a disinterested person herein; that
8 the foregoing transcript of the Senate Select Committee
9 hearing was reported verbatim in shorthand by me, Dennis
10 G. Peyton, and thereafter transcribed by computer-aided
11 transcription.
12 I further certify that I am not of counsel or
13 attorney for any of the parties to said hearing, nor in

15

16 IN WITNESS WHEREOF, I have hereunto set my
17 hand this_____ day of _____, 2001.

18

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20

21

Certified Shorthand Reporter No. 2934

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